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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 129**

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**GENERAL AMERICAN TANK CAR CORPORATION,  
PETITIONER,**

*vs.*

**EL DORADO TERMINAL COMPANY**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED JUNE 22, 1939.**

**CERTIORARI GRANTED OCTOBER 9, 1939.**



No. 8799

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**United States**  
**Circuit Court of Appeals**  
*For the Ninth Circuit.*

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**EL DORADO TERMINAL COMPANY, a cor-  
poration,**

**Appellant,**

**vs.**

**GENERAL AMERICAN TANK CAR COR-  
PORATION, a corporation,**

**Appellee.**

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**Transcript of Record**

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**Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division.**



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,  
PETITIONER,

vs.

EL DORADO TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

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**San Francisco, California.**

**Attorneys for Defendant and Appellee.**

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**In the Superior Court of the State of California in  
and for the City and County of San Francisco.**

**Nos. 259305-19929-L**

**EL DORADO TERMINAL COMPANY, a cor-  
poration,**

**Plaintiff,**

**vs.**

**GENERAL AMERICAN TANK CAR COR-  
PORATION, a corporation,**

**Defendant.**

**COMPLAINT.**

**Plaintiff complains of defendant and alleges for a**

**First Cause of Action**

**I.**

**That plaintiff, El Dorado Terminal Company is a  
corporation duly organized and existing under the  
laws of the State of California.**

## II.

That defendant General American Tank Car Corporation is a corporation organized under the laws of the State of West Virginia and is doing and transacting business in the State of California.

## III.

That between the first day of November, 1934 and the 31st day of May, 1935, defendant became indebted to plaintiff for money had and received to the use of plaintiff in the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88). Defendant promised to pay said sum to plaintiff, and plaintiff has demanded payment thereof, but no part thereof has been paid, and the whole of said amount is due and unpaid.

## Second Cause of Action

For a separate and second cause of action, plaintiff alleges: [1\*]

## I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

## II.

That within two years last past, and prior to the first day of November, 1934, defendant became indebted to El Dorado Oil Works for money had and received for the use of said El Dorado Oil Works, in the sum of Fifteen Hundred Fifty and

\*Page numbering appearing at the foot of page of original, certified Transcript of Record.

16/100 Dollars (\$1550.16). Defendant promised to pay said sum to El Dorado Oil Works, and El Dorado Oil Works demanded payment thereof, but no part thereof has been paid, and the whole of said amount is due and unpaid. That El Dorado Oil Works heretofore assigned to plaintiff, its said claim against defendant in the said sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16), and plaintiff is now the owner and holder of said claim, and as such has demanded payment thereof from defendant, but defendant has failed and refused to pay the said sum or any part thereof.

### Third Cause of Action

For a separate and third cause of action, plaintiff alleges:

#### I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

#### II.

That on or about September 28, 1933, defendant entered into a contract in writing with El Dorado Oil Works by the terms of which the defendant leased and let unto the said El Dorado Oil Works fifty (50) steel tank cars therein referred [2] to as "permanent cars," and such additional steel tank cars as the said El Dorado Oil Works should require during a period of three years from the 1st day of January, 1933 in the conduct of its business, and

said El Dorado Oil Works further agreed not to hire or use any tank cars except those belonging to defendant, and to pay to defendant for the use of said permanent cars the sum of Twenty-seven and 50/100 Dollars (\$27.50) per car per month, and to pay for the use of such additional cars so furnished by the defendant, at the rate of Thirty Dollars (\$30.00) per car per month for the time such cars were in the service of the El Dorado Oil Works; all of said cars were to be so delivered by the defendant to the said El Dorado Oil Works at San Francisco Bay points, and to be kept in good order, condition and repair by the said defendant, and upon the expiration of said agreement to be returned by the said El Dorado Oil Works to the said defendant at Berkeley or Oakland, in the State of California. In said contract defendant also agreed to collect from the railroads over the lines of which said cars were operated and employed, all mileage earned by the said cars; and on the 25th day of each month to credit all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month, and to pay over to the said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said oil works to the defendant. The said El Dorado Oil Works also agreed that the empty mileage haul of said cars should never exceed the full mileage haul thereof, and that at the expiration of said contract, if the empty mileage haul of

said cars on any railroad should exceed the loaded mileage haul thereon, the said El Dorado Oil Works would pay such excess of empty mileage at the [3] rates established by the tariffs of the respective railroad lines. The said El Dorado Oil Works received and operated said tank cars, and paid the rental thereon up to and including the 31st day of October, 1934, and during said period kept and performed all the terms and conditions of said contract on its part to be performed.

### III.

That plaintiff is a wholly owned subsidiary of said El Dorado Oil Works, and in and by the said agreement of September 28, 1933, it was provided and agreed that all the rights and benefits thereof should pertain to and be enjoyed by any company affiliated with, or a subsidiary of, the said El Dorado Oil Works; and on or about October 31, 1934, said El Dorado Oil Works assigned all its right, title and interest in said agreement, and in the cars therein referred to, to the plaintiff, and plaintiff undertook to carry out and perform the said agreement. That defendant consented to said assignment as in said agreement provided. That ever since the first day of November, 1934, plaintiff has carried out and performed all the undertakings, terms and conditions of said agreement on the part of said El Dorado Oil Works to be kept or performed, and has employed and used the said tank cars for the purposes provided in said agreement, and has paid

the rental and service charges thereon as in said agreement provided. During said period and up to the 31st day of May, 1933, defendant has collected and received from the railroad companies over the trackage of which the said cars were operated and employed, Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88), in excess of the sums payable as rentals, or to be credited to the said defendant under the terms of the said contract. That plaintiff has demanded payment of said sum but [4] defendant has failed and refused to pay the same or any part thereof, and still retains the same and the whole thereof.

#### Fourth Cause of Action

For a fourth and separate cause of action, plaintiff alleges:

##### I.

Plaintiff here refers to paragraphs I and II of the third cause of action, and by such reference incorporates them herein and adopts the same with the same effect as though set forth at length herein.

##### II.

That from and after the 1st day of January, 1934 to and including the 31st day of October, 1934, defendant had collected and received from the railroad companies over trackage of which the said tank cars were operated and employed, the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16) in excess of the sums payable or to be credited by

El Dorado Oil Works to the said defendant under the terms of said contract. That El Dorado Oil Works demanded payment of said sum, but defendant failed and refused to pay the same or any part thereof, and still retains the same and the whole thereof. That prior to the commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for the said sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16), and plaintiff is now the owner and holder of said claim, and as such has demanded payment thereof from defendant, but defendant has failed and refused to pay said sum or any part thereof.

#### Fifth Cause of Action

And for a fifth and separate cause of action plaintiff alleges: [5]

##### I.

Plaintiff here refers to paragraphs I and II of the first cause of action, and adopts the same, and by such reference incorporates the same herein.

##### II.

That within four years last past, defendant became indebted to plaintiff for balance due on a mutual open and current account for money had and received for the use of plaintiff, the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars (\$18,580.88). That plaintiff has demanded payment of said sum but defendant has failed and refused to pay the same or any part

thereof, and the whole thereof is now due and unpaid.

### Sixth Cause of Action

And for a sixth and separate cause of action, plaintiff alleges:

#### I.

Plaintiff here refers to paragraphs I and II of the first cause of action and adopts the same, and by such reference incorporates the same herein.

#### II.

That within four years last past defendant became indebted to El Dorado Oil Works, for a balance due on a mutual open current account for money had and received for the use of El Dorado Oil Works, the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16). That El Dorado Oil Works demanded payment of said sum but defendant has failed and refused to pay the same or any part thereof, and the whole thereof is now due and unpaid. That heretofore, El Dorado Oil Works assigned to plaintiff said claim against defendant for the sum of Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16); and plaintiff is now the owner and holder of said claim and as such has demanded payment thereof from defendant [6] but defendant has failed and refused to pay said sum or any part thereof.

Wherefore, plaintiff prays judgment against said defendant for the sum of Twenty-one Thousand One Hundred Thirty-one and 04/100 Dollars (\$21,131.-

04), with interest thereon from the date that each monthly installment thereon became due, and for costs of this suit.

**WILLIAMSON & WALLACE,**  
Attorneys for Plaintiff. [7]

State of California

City and County of San Francisco.—ss.

S. M. Haslett, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Secretary of the El Dorado Terminal Company, the plaintiff in the above entitled action, and as such officer of such corporation deponent is authorized to act for it herein and make this verification on its behalf. That he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

**S. M. HASLETT.**

Subscribed and Sworn to before me, this 19th day of June, 1935.

[Seal]      **AMY B. TOWNSEND,**

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed in State Court, Jun. 19, 1935.  
H. I. Mulcrevy, Clerk by C. P. Winter, Deputy Clerk. Filed in U. S. District Court, August 12, 1935. Walter B. Maling, Clerk by J. P. Welsh, Deputy Clerk. [8]

[Title of Superior Court and Cause.]

## ORDER OF REMOVAL.

The defendant, General American Tank Car Corporation, a corporation, having filed within the time provided by law its petition for the removal of this cause to the Southern Division of the United States District Court for the Northern District of California, and having at the same time offered its bond in the sum of One Thousand Dollars (1,000.00) with the Indemnity Insurance Company of North America, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, good and sufficient surety conditioned according to law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had, prior to the filing of said petition, been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the law, this Court does now hereby accept and approve said bond and said petition, and does order this cause to be removed to the Southern Division of the United States District Court for the Northern District of California, pursuant to the statute of the United States, and that all other proceedings of this Court be stayed.

Dated: July 18th, 1935.

T. I. FITZPATRICK,

Judge of the Superior Court.

[Endorsed]: Filed in Superior Court, July 18, 1935. Filed in U. S. District Court, August 12, 1935.

In the Southern Division of the United States District Court for the Northern District of California.

No. 19929-L

EL DORADO TERMINAL COMPANY, a corporation,

Plaintiff,

vs.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,

Defendant.

### ANSWER

Comes now General American Tank Car Corporation, a corporation, defendant herein, and answering plaintiff's complaint on file herein, admits, denies and avers as follows: [10]

#### First Cause of Action

##### I.

Admits the allegations of Paragraph I of the first cause of action of the said complaint.

##### II.

Answering Paragraph II of the first cause of action of the said complaint, defendant, denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

## III.

Denies each and every, all and singular, the allegations of Paragraph III of said first cause of action of the said complaint.

## Second Cause of Action

## I.

Answering Paragraph I of the second cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

## II.

Answering Paragraph II of said second cause of action of the said complaint, defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation that El Dorado Oil Works heretofore assigned to plaintiff the alleged claim against defendant referred to in the said paragraph and, basing its denial upon that ground, denies said allegation; and defendant denies each [11] and every, all and singular, of the other allegations contained in the said Paragraph II of said second cause of action.

## Third Cause of Action

## I.

Answering Paragraph I of the third cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of

California, but by its answer herein defendant enters a general appearance in this proceeding.

**II.**

Answering Paragraph II of the third cause of action of the said complaint, defendant denies that in the contract referred to in the said paragraph defendant agreed to credit, on the 25th day of each month all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month, or to pay over to said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said Oil Works to defendant; and in this behalf defendant refers to the said contract, a copy of which is attached hereto, marked Exhibit "A," as hereinafter alleged in defendant's separate answer and defense to the said complaint.

**III.**

Answering Paragraph III of the third cause of action of the said complaint, defendant denies that during the period between the 1st day of November, 1934, and the 31st day of May, 1935, or up to the 31st day of May, 1935, defendant has collected or received from the railroad companies, over the trackage of which the said cars were operated and employed, the sum of Eighteen Thousand Five Hundred Eighty and 88/100 Dollars [12] (\$18,580.88) in excess of the sums payable as rentals or to be credited to the said defendant under the terms

of the said contract; and in this respect defendant avers that during the said period it received from the said railroad companies the sum of Twenty-eight Thousand Five Hundred Ninety-five and 79/100 Dollars (\$28,595.79) and credited thereof the sum of Ten Thousand Nine Hundred Eighty-one and 66/100 Dollars (\$10,981.66) to the account of El Dorado Oil Works.

#### Fourth Cause of Action

##### I.

Answering Paragraph I of the fourth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding; denies that portion of the said Paragraph I of the fourth cause of action which alleges by way of reference to Paragraph II of the third cause of action of the said complaint that in the said contract defendant agreed to credit on the 25th day of each month all mileage earned by said cars or so collected against the rentals then due to defendant for the use of said cars for the previous month and to pay over to said El Dorado Oil Works any excess mileage earnings over and above said rental and service charges then found to be due from the said Oil Works to defendant, and in this behalf defendant refers to the said contract, a copy of which is attached hereto, marked Exhibit "A," as hereinafter alleged in defendant's separate answer and defense to said complaint.

## II.

Answering Paragraph II of said fourth cause of [13] action, defendant denies that from or after the 1st day of January, 1934, to or including the 31st day of October, 1934, it has collected or received from the railroad companies, over the trackage of which the said tank cars were operated and employed, the sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) in excess of the sums payable or to be credited by El Dorado Oil Works to defendant under the terms of the said contract and in this respect avers that during the said period defendant received from the said railroad companies the sum of Twenty-two Thousand Eight Hundred Seven and 79/100 Dollars (\$22,807.79) and credited thereof, the sum of Twenty-one Thousand Eight Hundred Eighty-nine and 14/100 Dollars (\$21,889.14) to the account of the said El Dorado Oil Works; alleges that defendant has no information or belief upon the subject sufficient to enable it to answer the allegation that prior to the commencement of this action El Dorado Oil Works assigned to plaintiff the alleged claim referred to in the said paragraph and, placing its denial upon that ground, denies said allegation; admits that said El Dorado Oil Works demanded payment of the said sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) but defendant failed and refused to pay the same or any part thereof; and denies each and all of the allegations of said paragraph other than those hereinbefore expressly admitted or specifically denied.

**Fifth Cause of Action****I.**

Answering Paragraph I of the fifth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its [14] answer herein defendant enters a general appearance in this proceeding.

**II.**

Defendant denies each and every, all and singular, the allegations of Paragraph II of said fifth cause of action of the said complaint.

**Sixth Cause of Action****I.**

Answering Paragraph I of the sixth cause of action of the said complaint, defendant denies that it is doing or transacting business in the State of California, but by its answer herein defendant enters a general appearance in this proceeding.

**II.**

Answering Paragraph II of the said sixth cause of action, defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation that heretofore El Dorado Oil Works assigned to plaintiff the alleged claim against defendant for the sum of Fifteen Hundred and Fifty and 16/100 Dollars (\$1,550.16) referred to in the said paragraph and, basing its denial upon that ground, denies the said allegation, and defendant denies each and every, all and singular,

lar, of the other allegations in said Paragraph II of said sixth cause of action contained.

Further answering the complaint and for a separate and distinct answer and defense to each of the several causes of action in plaintiff's complaint contained, defendant avers as follows: [15]

I.

That on or about the 28th day of September, 1933, defendant made and entered into an agreement with El Dorado Oil Works, a corporation, copy of which agreement is attached hereto, marked Exhibit "A," referred to and made a part hereof.

II.

That defendant has credited said El Dorado Oil Works and the plaintiff with all of the mileage earnings in the complaint and in the said agreement referred to in an amount or amounts equal to the car hire or rental reserved in said agreement; that the defendant has refused, and still refuses to credit either the El Dorado Oil Works or the plaintiff with any mileage earnings in excess of said car hire or rental reserved in said agreement for the reason that defendant was and is expressly prohibited and enjoined therefrom by law and particularly by the provisions of that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Title 49, Sec. 41), commonly known as the Elkins

Act. In this behalf defendant avers that the said tank cars leased by defendant to the said El Dorado Oil Works as in said agreement provided were used during the times specified in the complaint in the transportation of property of the said El Dorado Oil Works over the lines of railway of common carriers subject to the said Elkins Act, and that such transportation was almost entirely in interstate or foreign commerce. That under the terms of the tariffs of such common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by the carriers for the use of privately owned cars employed in the transportation of prop- [16] erty over the lines of railway of such common carriers, according as their respective lines of railway may run. That if defendant were to credit or to pay over to the plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

Wherefore, defendant prays that the complaint be dismissed, that the plaintiff take nothing, and that defendant have judgment for its costs of suit and disbursements incurred herein.

ALLAN P. MATTHEW,  
JOHN O. MORAN,  
McCUTCHEN, OLNEY, MANNON  
& GREENE,

Attorneys for Defendant.

Service of the within answer and receipt of a copy thereof is hereby admitted this 10th day of September, 1935.

WILLIAMSON & WALLACE,  
Attorneys for Plaintiff. [17]

State of California,  
City and County of San Francisco.—ss. .

Allan P. Matthew, being first duly sworn, deposes and says:

That he is an attorney at law, duly authorized and licensed to practice in all of the courts of the State of California and in the United States District Court for the Northern District of the State of California; that he is one of the attorneys for defendant in the above entitled action; that affiant has his office in the City and County of San Francisco, in the said State; that the defendant is a corporation organized under the laws of the State of West Virginia, and a non-resident of the State of California; that all of its officers are non-residents of the State of California and are all outside of the

State of California, and that no one of the officers of the defendant is now within the State of California, the place where affiant has his office; that affiant makes this affidavit on behalf of the defendant by reason of the facts hereinbefore set forth; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

ALLAN P. MATTHEW.

Subscribed and Sworn to before me this 7th day of September, 1935.

[Notarial Seal] CHALMER MUNDAY,

Notary Public in and for the City and County of San Francisco, State of California. [18]

### EXHIBIT "A"

This agreement made and entered into this 28th day of September, 1933, by and between General American Tank Car Corporation, a West Virginia corporation, first party, and El Dorado Oil Works, a California corporation, second party:

#### Witnesseth:

First: First party does hereby lease and let unto second party, and second party does hereby rent and hire from first party, fifty (50) tank cars (hereinafter sometimes called "Permanent Cars"), all of which Permanent Cars shall be coiled tank cars of an approximate capacity of eight thousand (8,000)

gallons each. Said Permanent Cars shall bear the reporting marks of the First party, or any other reporting marks which the first party may elect. Said Permanent Cars are now in the service of the second party under an agreement with the first party which expires December 31, 1933, and possession of said cars under said agreement expiring December 31, 1933 shall be and it is hereby agreed to be delivery to the second party by the first party of said Permanent Cars.

Second: All tank cars without compartments and non-insulated, of six thousand (6,000) gallon, eight thousand (8,000) gallon and ten thousand (10,000) gallon capacity, without coils, or with coils up to six (6) lines, are hereinafter referred to as "standard tank cars." First party does hereby lease and let to the second party, and second party does hereby rent and hire from the first party, second party's entire requirements of standard tank cars over and above said Permanent Cars. Such cars shall bear the reporting marks of the first party, or any other reporting marks which the first [19] party may elect. Such cars shall be delivered to the second party at points on San Francisco Bay, designated by the second party, within a reasonable time after request therefor, subject to all delays due to fires, strikes, accidents, railroad embargoes and congestions, and all other and like causes beyond the control of the first party. All cars furnished hereunder, over and above said Permanent Cars shall not bear the name of the second party.

Second party covenants and agrees, in so far as it may lawfully do so, that it will use the tank cars of the first party exclusively, at all times during the term of this agreement for the second party's entire requirements of standard tank cars, including all such requirements of second party's subsidiaries and other corporations as hereinafter specified, and that it will not use any standard tank cars of others during said term, provided first party's standard tank cars are available for loading at the time, upon reasonable notice, and if not so available, second party shall have the right to use the standard tank cars of others for the period during which the first party's tank cars are not so available. The term: "entire requirements of standard tank cars" wherever used in this agreement is intended to mean and shall be construed as meaning the number of standard tank cars needed by the second party during the term of this agreement, over and above said Permanent Cars, for the transportation of the products of the second party, it being understood that the second party does and may, in its discretion, use means of transportation of the products of the second party, other than by rail, but that no other means of transportation shall be used or employed by the second party to the complete exclusion of transportation [20] by rail in standard tank cars. A particular tank car furnished by first party to the second party hereunder, over and above said Permanent Cars, shall be considered as leased to the second party when made available by first party

to second party upon reasonable notice, at points on San Francisco Bay, designated by second party, and shall continue to remain in the service of the second party until returned to the first party at Berkeley, California or Oakland, California, as second party shall determine.

The term: "second party" as used herein shall include the El Dorado Oil Works and all existing and future subsidiary companies of El Dorado Oil Works and corporations controlled, operated or managed by El Dorado Oil Works.

Third: Second party agrees to use all the tank cars furnished hereunder exclusively in its service for the transportation of its products, which products will not injure or affect the tanks, and agrees that said cars shall not be shipped beyond the boundaries of the United States, Canada or Mexico, without the written consent of the first party. Second party further agrees to pay to the first party for the use of the Permanent Cars the sum of Twenty-seven and 50/100 Dollars (\$27.50) per car per month, and for the use of the tank cars furnished hereunder, over and above said Permanent Cars, at the rate of Thirty Dollars (\$30) per car per month, for the time such cars are in the service of the second party. Said payments shall be made to the first party at its office, 940 Continental Illinois Bank Building, Chicago, Illinois. Payment of the rental on said Permanent Cars shall be made on the first day of each month in advance, without deduction, except as set forth in paragraph Sixth hereinafter.

[—OK Gen'l Amer. Tank Car Corp'n., R. T. Musser.] Payment of the [21] rental on the tank cars furnished by the first party to the second party hereunder, over and above said Permanent Cars, shall be made on the fifth (5) day of each month, immediately following any month during which any of said cars have been in the service of the second party.

Fourth: This agreement is to remain in full force and effect for a period of three (3) years beginning January 1, 1934 and ending December 31, 1936. Second party shall have the right to extend the term of this agreement for an additional period of two (2) years, that is to say, until December 31, 1938, provided that it shall give to the first party notice in writing of its election so to extend this agreement, on or before December 1, 1936. Second party agrees upon the expiration hereof, to cause all of the cars covered hereby to be returned to the first party at Berkeley, California, or Oakland, California, and from time to time to cause all of the cars over and above the Permanent Cars, to be returned to the first party at Berkeley, California, or Oakland, California, as hereinbefore provided, all of said cars to be returned in the same condition in which they were furnished, excepting for ordinary wear and tear.

Fifth: First party agrees to maintain all cars covered by this agreement in good condition and repair according to present requirements of railroad companies and existing American Railway

**Association Mechanical Rules.** No repairs shall be made by the second party for the account of the first party without the written consent of the first party. If any of said cars be held in railroad or car shops for repairs for a period longer than five (5) days from the date when the damage to or wreck of such car is reported to the first party, then and in that [22] event, rental or service charges covering such car shall cease from and after such period of five (5) days until such car is released from the shop, or until such car has been replaced by first party by another car. The first party shall have the right to substitute for any car leased hereunder, another car of the same type and capacity. The first party shall not be liable for any damage to or loss of the whole or any part of any shipment made in any of the cars covered by this agreement, nor for any loss or damage arising through injuries or fatalities to persons, nor for destruction of or damage to said cars or any other property, which may be caused by any explosion or breaking of said cars, or any parts thereof, or the use of said cars, and said second party agrees to protect and save harmless said first party from any such loss or damage to persons or property. If any of said cars are damaged or destroyed while on any privately owned tracks, the second party shall pay unto the first party the cost of repairing such damage or replacing such destroyed car or cars. The second party shall replace any removable tank parts (dome lids, outlet caps, safety valves, etc.), if lost or broken.

Sixth: The First party shall collect all mileage earned by the cars covered by this agreement and keep all records appertaining to their movements. Second party shall assist first party in following the movements of said cars by furnishing to the first party complete reports of the movements of cars, giving date, routing, and destination of each movement. The first party shall each month credit to the rental or service account of the second party all mileage earned by said cars while in the service of second party according to and subject to all rules of the tariffs of the railroads. Said mileage credit shall be reported to the second party on or about the twenty-fifth (25th) [23] day of the month succeeding the month during which such mileage is earned. The second party agrees so to use said cars that their mileage under load shall be equal to their mileage empty on each railroad over which they move. Should the empty mileage on any railroad exceed the loaded mileage, the second party shall immediately upon the expiration or termination of this agreement, pay to the first party for such excess, as so much additional rental or service charge at the rate established by the tariff of the railroad on which such excess of empty mileage is incurred.

Seventh: It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the second party shall make default in the payment of the rental or service charges for said cars at the time when the same become due, and payable, and such default shall continue for five (5) days, or shall make default in the

performance of any of the other agreements herein contained to be by it performed, and such default, other than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the first party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the second party and furnish the same or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the second party agrees to satisfy and pay any and all such deficiency promptly upon demand from time to time. [24]

Eighth: This agreement shall be binding upon the parties hereto, their respective successors, representatives, administrators, and executors, but shall not be transferrable by operation of law, or assignable by the second party, nor shall any rights hereunder with respect to said cars be transferred or assigned by the second party without the written consent of the first party. Should a petition in bankruptcy or a petition for a receiver be filed by or against the second party, or should it make an assignment for creditors, then this agreement may, at the option of the first party, be and become terminated. No title or leasehold or property interest of any kind in said cars, or any of them shall vest in

the second party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the second party or its use thereof hereunder. No lettering or marking of any kind shall be placed upon said cars or any of them by the second party.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their respective duly authorized officers, and attested by their Secretaries, and corporate seals to be hereunto affixed the day and year first above written.

**GENERAL AMERICAN TANK  
CAR CORPORATION;**

By LEROY KRAMER,

Vice President.

Attest:

W. S. HEFFERAN, JR.,

Secretary.

**EL DORADO OIL WORKS,**

By W. B. REIS,

President.

Attest:

S. M. HASLETT,

Secretary.

[Endorsed]: Filed Sep. 10, 1935. [25]

[Title of District Court and Cause.]

**STIPULATION WAIVING JURY.**

It is hereby stipulated by and between the parties to the above entitled action that the trial of the above entitled cause may be, and the same shall be, tried before the above entitled Court, sitting without a jury, and each of the parties hereto hereby waives its right to demand a jury for the trial of the above entitled cause.

**WILLIAMSON & WALLACE,**

Attorneys for Plaintiff.

**McCUTCHEN, OLNEY, MANNON &  
GREENE,**

Attorneys for Defendant.

[Endorsed]: Filed Jan. 27, 1936. [26]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW.**

The above entitled cause came on regularly for trial and was tried before the Court, Honorable Harold Louderback sitting as Judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their respective counsel and evidence, both oral and written, was introduced. The cause was argued orally and upon briefs and duly submitted for decision. The Court having considered [27] the evidence and the law applicable thereto and being fully advised

in the matter, hereby makes its decision and its findings of fact and conclusions of law.

### Findings of Fact.

The Court finds the facts to be as follows:

#### I.

Plaintiff is a corporation, wholly owned and controlled by El Dorado Oil Works, a corporation engaged in the production and shipment of cocoanut oil. Defendant, General American Tank Car Corporation is the owner of certain tank cars and is engaged, among other things, in furnishing these cars under contract to shippers for the transportation of cocoanut oil and other liquid commodities.

#### II.

On September 28, 1933, defendant entered into a written agreement with El Dorado Oil Works with respect to the furnishing of tank cars for use by said El Dorado Oil Works in the transportation of its products. A copy of said agreement is attached as "Exhibit A" to the defendant's answer to the complaint. On or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said agreement, and in the cars therein referred to to plaintiff. Defendants consented to said assignment. Plaintiff has been a wholly owned and controlled subsidiary of said El Dorado Oil Works at all times since the making of said assignment. Prior to the commencement of this action and on May 1, 1935,

said El Dorado Oil Works duly assigned and transferred to plaintiff by written instrument all claims and demands of said El Dorado Oil Works against defendant arising out of said [28] agreement.

Under said agreement defendant leased to said El Dorado Oil Works 50 tank cars, which are referred to in the agreement as "permanent cars", at the rental of \$27.50 per car per month. The said agreement also provided that defendant would furnish said El Dorado Oil Works its entire requirement of tank cars over and above the 50 permanent cars, at a rental of \$30. per car per month. It was further provided that defendant should each month credit to the rental or service account of said El Dorado Oil Works all mileage earned by the cars while in the service of said El Dorado Oil Works, according and subject to all rules of the tariffs of the railroad common carriers over whose lines said cars should be transported. The said agreement was to remain in effect for a period of three years beginning January 1, 1934, and ending December 31, 1936. The said El Dorado Oil Works was given the right to extend the term of said agreement for an additional two years provided it gave defendant notice in writing on or before December 1, 1936, of its election so to extend said agreement.

### III.

The tank cars leased by defendant to said El Dorado Oil Works and to plaintiff as provided in said agreement were used during the times specified in said complaint in the transportation of property

of said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the [29] Elkins Act. Such transportation was almost entirely in interstate or foreign commerce. More specifically, ninety-nine (99) per cent or more of said shipments in said tank cars were interstate in character. Under the terms of the tariffs of said common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by such carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers, according as their respective lines of railway may run.

#### IV.

During the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said agreement to credit to said El Dorado Oil Works all of the mileage earnings collected and received on said tank cars from said common carriers and to pay over to said El Dorado Oil Works each month all of said mileage earnings in excess of the car hire or rental reserved in said agreement. On July 2, 1934, the Interstate Commerce Commission rendered its decision in I. & S.

Docket No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323. A copy of said decision, marked "Exhibit 1," is attached to and made a part of the stipulation of facts entered into between plaintiff and defendant and presented in this proceeding. Following the rendition of said decision defendant was advised by counsel and concluded that the crediting and payment to plaintiff of mileage earnings, received from the aforesaid railroad companies, in excess of the car hire or rental reserved in said agreement was prohibited by and would be in violation of said Elkins Act. As a consequence of such decision and such advice and conclusion defendant has refused to pay over to said [30] El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

V.

During the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$22,807.79 and credited thereof the sum of \$21,889.14 to the account of El Dorado Oil Works. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is the sum of \$918.65. During the period between the 1st day of November, 1934, and the 31st day of May, 1935, defendant collected and received from the railroad companies, over whose lines of railway the

shipments involved were transported, the sum of \$28,595.79 and credited thereof the sum of \$10,981.66 to the account of plaintiff. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is the sum of \$17,614.13. The total mileage earnings, in excess of the car rental, withheld by defendant for the entire period from January 1, 1934, to May 31, 1935, were and are the sum of \$18,532.78. Defendant has credited said El Dorado Oil Works and plaintiff with all of the mileage earnings in the complaint and in said agreement referred to, in an amount or amounts equal to the car hire or rental reserved in said agreement.

## VI.

There was and is no corporate relationship between defendant, General American Tank Car Corporation, and any of said rail carriers over whose lines of railway said shipments [31] of El Dorado Oil Works and plaintiff were transported.

## Conclusions of Law

From the foregoing facts the Court concludes:

### I.

That defendant was and is prohibited and enjoined by law, and particularly by the provisions of that certain statute of the United States of America entitled "An Act to further regulate commerce with foreign nations and among the states" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act,

from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.

II.

That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

III.

That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage [32] earnings as were not in excess of the car hire or rental reserved in said agreement.

IV.

That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.

HAROLD LOUDERBACK

District Judge

Approved as to form, as provided in Rule 22.

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff.

Receipt of a copy of the within Findings of fact and conclusions of law. Admitted this 30th day of July, 1937.

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 2, 1937. [33]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,929-L

**EL DORADO TERMINAL COMPANY**, a corporation,

Plaintiff,

vs.

**GENERAL AMERICAN TANK CAR CORPORATION**, a corporation,

Defendant.

### JUDGMENT

The above entitled cause came on regularly for trial and was tried before the court, Honorable Harold Louderback sitting as judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their respective counsel, and evidence, both oral and written,

[34] was introduced. The cause was argued orally and upon briefs and duly submitted for decision, and the court, after due consideration, having rendered its decision and filed its Findings of Fact and Conclusions of Law and having ordered that plaintiff take nothing by its said action and that defendant have judgment against plaintiff for its costs herein incurred,

Now, Therefore, by virtue of the law and by reason of said Findings of Fact and Conclusions of Law, It Is Hereby Ordered, Adjudged and Decreed, that plaintiff above named, El Dorado Terminal Company, take nothing by its said action, and that defendant, General American Tank Car Corporation, do have and recover of and from said plaintiff its costs and disbursements in this action, taxed at the sum of Sixty-two and 40/100 Dollars (\$62.40).

Judgment entered this 2nd day of September, 1937.

WALTER B. MALING

Clerk

Approved as to form, as provided in Rule 22.

WILLIAMSON & WALLACE

Attorneys for Plaintiff

Judgment entered in Judgment Register 16 at  
Page 598. [35]

[Title of District Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS

Engrossed Bill of Exceptions of plaintiff El Dorado Terminal Company, a corporation, in the above entitled action, to be used upon said plaintiff's appeal from the judgment in said action and for any and all purposes for which a bill of exceptions can properly be used.

Be It Remembered that the above entitled action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, by the filing of the plaintiff's complaint in the office of the County Clerk of the [36] City and County of San Francisco, State of California, and ex officio Clerk of said Superior Court. Said action as so commenced was entitled as above and numbered on the files of said Superior Court, No. 259305. Thereafter defendant General American Tank Car Corporation duly presented to said court and filed its petition for removal of said cause into the above entitled court and its bond in connection therewith and duly served and filed notice of presentation of said petition and bond, and thereafter in said Superior Court such proceedings in said cause were duly taken and had, that said petition was granted and said bond was approved and said court made its order removing said cause from said Superior Court and into the above entitled court. Thereafter petitioner and defendant General American Tank Car Corporation duly filed in the above entitled court and in the office of the clerk thereof a duly certified copy of the Record of all

of the papers that had been filed and all proceedings had in said Superior Court and duly served upon plaintiff notice of filing of said record in the above entitled court. Thereafter said defendant duly appeared and duly served and filed its answer in the above entitled cause and court. Pursuant to notice duly given by said plaintiff to said defendant, and in accordance with stipulation duly entered into by and between the parties to the above entitled cause, the depositions of Donald H. Smith, Thomas B. Kais, and Arthur A. Solenke were duly taken on December 9th and 10th, 1935, in Chicago, Illinois in the presence of counsel of both parties. On October 28, 1936, the above entitled cause came on duly and regularly for trial in the above entitled court before the Honorable Harold Louderback, District Judge, duly designated and assigned therefor. Said cause was tried before said court sitting without a jury, a jury trial having been duly waived by written stipulation of the parties filed with said court. [37]

Said cause was tried on October 28, 1936, and February 27, 1937. Between said dates an opening brief for plaintiff, a brief for defendant, and a reply brief for plaintiff were duly served and filed in said cause, and on February 27, 1937, said cause was duly argued orally before said court and submitted to the court by both parties."

On said trial said plaintiff duly appeared by its attorneys, Messrs. Williamson & Wallace and R. P. Norton, Esq., and the defendant by its attorneys, Messrs. McCutchen, Olney, Mannon & Greene,

Allan P. Matthew, Esq., and John O. Moran, Esq. Thereupon the following proceedings and none other were taken and had and the following evidence, both oral and documentary, and none other, was offered and introduced, all as more particularly appears as follows:

Mr. Williamson made an opening statement on behalf of plaintiff, in the course of which he said:

The plaintiff in this case is the El Dorado Terminal Company claiming as an assignee in part of the El Dorado Oil Works. The companies are affiliated; the Terminal Company is wholly owned by the Oil Works. The action grew out of these facts: On September 28, 1933, the General American Tank Car Corporation, a West Virginia corporation, with headquarters in Chicago, and which operated in California, made a contract with the El Dorado Oil Works, an oil manufacturing company, a California corporation, under the terms of which the Tank Car Corporation leased to the oil works fifty tank cars for a period of years, and such additional cars as the oil works would require for the transportation of cocoanut oil from the plant of the Oil Works in West Berkeley to various points in the middle west, and in some instances to eastern states. A monthly rental was to be paid by the Oil Works to the Tank Car corporation for the [38] use of those cars. In turn, the Tank Car corporation agreed to credit a refund or repayment to the Oil Works on the mileage earned by those cars in excess of the rental paid. So that if the Oil Works were called upon to pay monthly in advance the rental of \$30 for each

car used in the movement of their product, and if it should earn in excess of \$30, that excess was to come back to the Oil Works. Pursuant to the agreement, the cars were furnished and were used.

The railroads then had a tariff; that tariff was paid by the shipper or the consignee; in this instance the full freight was always paid, but it was paid by the consignees and not by the Oil Works. The railroad then under its tariff regulations made an allowance to the owner or the lessee of the cars theoretically as compensation for the furnishing of those cars which the railroad did not furnish and did not hold themselves out as furnishing. That is what we speak of in this case as "mileage". In pursuance of the contract the cars were moved from the West Berkeley plant of the El Dorado Oil Works to these various consignees who, in turn, paid the fixed tariff rates or charges without reduction. The tank car company at regular intervals, that is, monthly, accounted to the El Dorado Oil Works for the mileage earned and received, and remitted for it to the Oil Works up to July 1, 1934; that is to say, from the commencement date of the contract, January 1, 1934, until the end of June, 1934. That Tank Car corporation having received the money on the mileage from the railroad, paid the mileage above the rentals to the company, in accordance with the provisions of its contract and without question. The reason for the change on the part of the Tank Car Corporation, as disclosed, was this: That in July, 1934, the Interstate Commerce Commission rendered a decision, with a consonant order,

applicable to refrigerator cars. In that [39] order it prohibited, in effect, refunds in the nature of rebates to the owners and operators of refrigerator cars, mostly in and about Chicago, because those refunds or rebates were, in effect, preferences of preferential payments in favor of those shippers who had those cars and was not enjoyed generally by all.

We say that it is absolutely in terms limited to refrigerator cars.

The next point advanced by the Tank Car Corporation as a reason for discontinuing the payments required under this contract was that such payments were in violation of the provisions of the so-called Elkins Act. Our position is that the Elkins Act does not apply and that the decision by the Interstate Commerce Commission likewise does not apply, and that the contract calls for the payments. They paid up to the time of the decision, and they should have paid from then on.

Mr. Matthew made an opening statement on behalf of the defendant, in the course of which he said:

It should be stated that the clause of the contract which refers to the collection by the defendant of the mileage earnings from the rail carriers provides for the crediting of those payments to the El Dorado Oil Works, the other party to the contract. The railroads provide in their tariffs that a certain allowance of so much per mile—I think in the case of tank cars  $1\frac{1}{2}$  cents per mile—shall be allowed for the use of the car in railroad service. Under the terms of the contract the General American Tank

Car Corporation did, up to mid-summer of 1934, credit the El Dorado Oil Works, or later its assignee, the El Dorado Terminal Company, the plaintiff here, with the full amount of these mileage earnings credited to the Tank Car Corporation by the rail carriers, even when the amount exceeded the rental which the El Dorado Oil Works was required to pay to the General American Tank [40] Car Corporation under the terms of the agreement of September 28, 1933.

After the decision of the Interstate Commerce Commission was announced in the refrigerator car case, the defendant concluded that it would be unlawful to continue further with the payment of any portion of the mileage received from the carriers in excess of the rental which the El Dorado Oil Works was obligated to pay for the use of the cars. Since that time, in the summer of 1934—more particularly about the end of May, 1934, the defendant has credited the Oil Works, or its successor, the El Dorado Terminal Company, as the assignee, with mileage earnings in the amount of the rental reserved for the use of the cars, deeming that any greater payment would be unlawful.

I might briefly call your Honor's attention to our defense, as set forth on page 7 of the answer. It is very brief, and I would like to read it because I think it would tend to make the issue very clear in your Honor's mind:

Paragraph II, line 6, page 7 of the answer, reads as follows: "That defendant has credited said El Dorado Oil Works and the plaintiff with all of the

mileage earnings in the complaint and in the said agreement referred to in an amount or amounts equal to the car hire or rental reserved in said agreement; that the defendant has refused, and still refuses, to credit either the El Dorado Oil Works or the plaintiff with any mileage earnings in excess of said car hire or rental reserved in said agreement, for the reason that defendant was and is expressly prohibited and enjoined therefrom by law and particularly by the provisions of that certain statute of the United States of America entitled 'An Act to further Regulate Commerce with Foreign Nations and Among the States'—commonly known as the Elkins Act. In this behalf defendant avers that the said tank cars leased by defendant to the said El Dorado Oil Works [41] as in said agreement provided were used during the times specified in the complaint in the transportation of property of said El Dorado Oil Works over the lines of railway of common carriers subject to the said Elkins Act, and that such transportation was almost entirely in interstate or foreign commerce. That under the terms of the tariffs of such common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by the carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers, according as their respective lines of railway may run. That if defendant were to credit or to pay over to the plaintiff or to said El Dorado Oil Works any part of the mileage pay-

ments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

I have read that to your Honor because I think it will assist you, in showing to your Honor what the real issue between the parties is.

Mr. Williamson then offered in evidence and read the following stipulation signed by counsel for both parties:

"It is hereby stipulated and agreed by and between El Dorado Terminal Company, a corporation, the plaintiff in the above-entitled action, hereinafter referred to as "plaintiff", and General American Tank Car Corporation, a corporation, the defendant in the above-entitled action, hereinafter referred to as "defendant," as follows: [42]

I.

"That the answer filed by the defendant in the above-entitled action correctly alleges and sets forth the sums collected and received by defendant from the railroad companies, over whose lines of railway the shipments of plaintiff and of El Dorado Oil Works involved were transported, and also cor-

rectly alleges and sets forth the sums thereof credited by defendant to the account of plaintiff and of El Dorado Oil Works during the periods covered by the complaint filed by the plaintiff in the above-entitled action; that, in particular, during the period between the 1st day of November, 1934, and the 31st day of May, 1935, or up to the 31st day of May, 1935, defendant collected and received from said railroad companies the sum of Twenty-eight thousand five hundred ninety-five and 79/100 (\$28,595.79) dollars and credited thereof the sum of Ten thousand nine hundred eighty-one and 66/100 (\$10,981.66) dollars to the account of the plaintiff; that during the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from said railroad companies the sum of Twenty-two thousand eight hundred seven and 79/100 (\$22,807.79) dollars and credited thereof (the sum of Twenty-one thousand eight hundred eighty-nine and 14/100 (\$21,889.14) dollars to the account of El Dorado Oil Works."

## II.

"That a full, true and correct copy of the contract made and entered into by and between defendant and El Dorado Oil Works on September 25, 1933, and referred to in the third and fourth causes of action of said complaint, is attached as Exhibit A to defendant's answer to said complaint filed in the above-entitled action.

III.

"That the tank cars leased by defendant to El Dorado Oil Works and to plaintiff as provided in said contract were used [43] during the times specified in said complaint in the transportation of property of, said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled: "An Act to Further Regulate Commerce with Foreign Nations and Among the States" (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41) commonly known as the Elkins Act; that such transportation was almost entirely interstate or foreign commerce; that, more specifically, 99 per cent or more of said shipments in said tank cars were interstate in character.

IV.

"That on or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said contract, and in cars therein referred to, to plaintiff; that defendant consented to said assignment; that plaintiff is, and at all times, since the making of said assignment has been, a wholly owned and controlled subsidiary of said El Dorado Oil Works.

V.

"That during the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said contract to credit to said El Dorado Oil Works all of the mileage earnings

collected and received on said tank cars and to pay over to said El Dorado Oil Works each month all of said mileage earnings in excess of the car hire or rental reserved in said contract; that on July 2, 1934, the Interstate Commerce Commission rendered its decision in I & S Docket No. 3887, Use of Privately Owned Refrigerator Cars, 201 I C C 323; that a copy of said decision is attached thereto, marked "Exhibit 1", and made a part hereof by reference; that following the rendition of said decision defendant was advised by counsel and concluded that the crediting [44] and payment to plaintiff of mileage earnings, received from the afore-said railroad companies, in excess of the said car hire or rental reserved in said contract was prohibited by and would be in violation of said Elkins Act; that as a consequence of such decision and such advice and conclusion defendant has refused to pay over to said El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

## VI.

"That there was and is no corporate relationship between defendant General American Tank Car Corporation and any of said rail carriers over whose lines of railway said shipments of plaintiff were and are being transported." [45]

EXHIBIT 1

19685

Interstate Commerce Commission

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Investigation and Suspension Docket No. 3887<sup>1</sup>  
Use of Privately Owned Refrigerator Cars

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Submitted May 1, 1934. Decided July 2, 1934

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1. Proposed amendment to rule 35 of the perishable protective tariff I. C. C. no. 5 found justified.
2. Proposed section 1 of rule 36 of said tariff found not justified without prejudice to respondents filing an amended section conforming to our suggestions herein.
3. It is the duty of common carriers by railroad to furnish such cars as may reasonably be necessary for the transportation of all commodities they hold themselves out to carry.
4. Carriers have the exclusive right to furnish cars. A private-car owner has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without s consent.
5. Payment in whole or in part to shippers, including meat packers, of mileage allowance by

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<sup>1</sup>This report also embraces Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part V, Private Freight Cars.

railroads, either direct or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

6. Any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by railroads for the use of such cars in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions.

Daniel H. Kunkel for the Commission.

E. H. Burgess, A. H. Kiskaddon, Walter McFarland, William F. Peter, W. C. Ranous, H. H. Larimore, B. H. Stanage, L. H. Strasser, P. F. Gault, L. C. Jorgensen, Elmer A. Smith, B. F. Batts, F. H. Towner, J. N. Davis, A. B. Enoch, J. A. Gallaher, J. P. Plunkett, D. C. Edwards, M. L. Countryman, Jr., and M. G. Roberts for railroad protestants.

D. C. Ellis, Earle R. Ballard, H. D. Bergen, Clifford H. Browder, C. D. Dooley, G. C. George, Nelson B. Green, G. A. Heinze, James J. Hoban, A. C. Hultgren, J. R. Van Slyke, John H. C. Kirk, Wilbur La Roe, Jr., Arthur L. Winn, Jr., Edward F. Ledwidge, Virgil E. McKeever, J. L. Roberts, Thomas J. Rowan, Herbert Schroeder, P. P. Steury,

George R. Sweeney, L. L. Thoms, F. B. Townsend, W. M. Tuohy, J. E. Bell, F. M. Bremmer, Geo. T. Rohrback, E. F. Scott, O. W. Tong, C. H. Reddick, S. L. Foete, G. E. Saddy, F. L. Thomas, Frank A. Powers, T. F. Dooley, Warren H. Wagner, Fayette B. Dow, H. W. MacArthur, Walker Wilson, M. H. Chapman, H. L. McReynolds, M. S. Hartman, Harrison F. Jones, Wm. R. Brown, Jesse M. Watkins, C. E. Donaldson, Parker McColleston, Arvid B. Tanner, Oscar G. Meyer, and Luther M. Walter for shipper protestants and shippers appearing in Ex parte 104.

C. R. Hillyer and Harry E. Kelly for car-line protestants.

D. P. Connell, Leo F. Wormser, Frank R. Watkins, R. J. Belson, Horace M. Wigney, Douglas Campbell, Arthur E. Bristol, W. S. Hefferan, Jr., Douglass Pillinger, Jervis Langdon, Jr., and Wm. M. Kelly for other car lines.

M. B. Pierce, C. S. Burg, A. H. Lossow, Edward D. Mohr, J. M. Souby, J. R. Bell, W. J. Larrabee, Charles R. Webber, H. V. Spike, R. S. Outlaw, Guernsey Orcutt, W. N. McGehee, and Thomas P. Healy for other railroads respondents in Ex parte 104.

George Patterson Boyle, R. O'Hara, and R. D. Rynder for meat packers not protestants.

Alfred P. Thom, Jr., and R. V. Fletcher for American Railway Association.

## Report of the Commission

By the Commission:

By schedules filed to become effective June 1, 1933, respondents proposed to eliminate from rule 35, paragraph B, of the perishable protective tariff. I. C. C. no. 5, the words "or brine tank refrigerator cars." By this elimination the carriers will hold themselves out to furnish such cars. By the same schedules they propose to change rule 36 by adding as section 1 thereto the following:

(A) Carriers reserve the right to furnish and will furnish refrigerator cars required for the transportation of commodities shown in item 1130 of tariff, as amended, offered for shipment and which require protective service.

(B) Shippers must arrange for their refrigerator car supply through the carrier or carriers serving them. Carriers may provide special type of refrigerator cars for the shipment of commodities shown in item 1130 of tariff, as amended, requiring protective service.

(C) Carriers will not accept in interchange empty refrigerator cars intended for loading on their lines unless specifically arranged for by them.

Exception.—Inasmuch as carriers are not in position to furnish refrigerator cars suitable for the transportation of all commodities of meat-packing companies, nothing in paragraphs A, B, and C will prevent the use of refrigerator cars, acquired by ownership or otherwise, by meat-packing companies for the

handling of commodities shown in item 1130 of tariff, as amended, requiring protective service, shipped by or consigned to them.

(D) Cars of private-car lines, including those of railroad control, will not be furnished by carriers for loading on their lines unless car owners certify under oath to carriers that no gift, gratuity, or part of the earnings from mileage payments, or otherwise, will be paid directly or indirectly to shippers, their agents or employees. The requirements of this rule will be considered as having been complied with when certification is made by car owners and filed with the Car Service Division of the American Railway Association, they in turn to notify carriers of the filing of such certificates.

(E) On and after the effective date of this rule advertisements of shippers or products are prohibited on newly constructed or repainted-refrigerator cars.

(F) Effective January 1, 1937, no refrigerator cars bearing advertisements of any shipper, consignee, or product, will be accepted in interchange or handled locally on any railroad.

(G) Nothing in these rules shall be construed to prevent any carrier or carriers from loading, or permitting to be loaded, refrigerator cars with clean freight which will in nowise render cars unfit for transporting perishable products or commodities shown in item 1130 of tariff, as amended, requiring protective service, for movement to or in the direction of the

# MICRO CARD

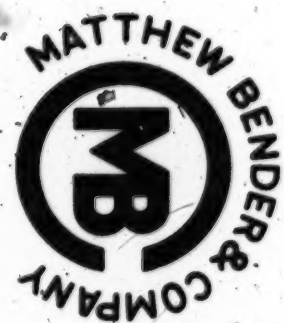
TRADE

MARK



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1168

65



owner or in reasonably direct home route when such handling is in the interest of economy in operation and elimination of empty mileage.

(H) The provisions of this section will not be applicable on traffic originating in territory covered by section no. 2 of this rule.

Section 2 of the rule effective January 1, 1929, which is not in issue, applies in the territory—

west of El Paso, Texas; Albuquerque or Belen, New Mexico; west of a line following the Oregon Short Line Railroad and Los Angeles and Salt Lake Railroad, Ogden, Utah, to Nephi, Utah, via Salt Lake City and Provo, Utah, or north or west of Pocatello, Idaho, or south of Portland, Oregon.

Section 1 was made inapplicable to the territory described because restrictions similar to those provided in section 1 are now in effect there.

• A number of shippers, principally those handling butter, eggs, cheese, and dressed poultry, hereinafter referred to collectively as dairy products, and canned goods, from or to points in western trunk-line and Mountain-Pacific territories, and some private-car lines, filed protests against the proposed rule. Subsequently, 23 carriers, mostly those operating in western territory, filed a petition asking that we reconsider our refusal to approve a sixth-section application seeking authority to cancel their participation in the above rule on one day's notice, or to suspend the operation of that rule. The operation thereof was suspended until January 1, 1934, and has since been voluntarily suspended.

On our own motion, July 6, 1931, we instituted a proceeding of inquiry and investigation designated Ex parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses. To facilitate the investigation different phases were considered separately and assigned part numbers. Part V, Private Freight Cars, deals with conditions surrounding and attending the use of cars owned or operated by persons or corporations, other than common carriers by railroad, but including carrier-controlled corporations. September 1, 1931, questionnaires were sent to all carriers and 503 operators of private-car lines. After a study thereof, part V was set down for hearing with the investigation and suspension proceeding. The records were consolidated so far as they deal with refrigerator cars.

The burden of justifying the proposed rules was borne by the American Railway Association, hereinafter referred to as the association. Its president was its only witness. His testimony is based principally on statements and complaints, written and oral, made to the association by various western carriers. His information, and consequently his testimony, was very general in character. He was not familiar with the details of the facts or the extent of the abuses which gave rise to the carriers' representations, and the individual carriers did not present any witness to assist him.

The president of the General American Car Corporation also testified in support of the suspended rule.

The term "private-car line" is used hereinafter to designate organizations or corporations sup-

ported by private, as distinguished from railroad, capital that control or own a number of cars which they place in the service of railroads or shippers, and whose principal income is derived from compensation for the use of such cars. The term "carrier-controlled lines" is used to designate independently operated corporations engaged in a business similar to that of the private-car lines, the stock of which is owned by one or more railroads. The term "railroad-owned cars" is used to designate cars owned and operated by one railroad. The term "railroad cars" is used to cover railroad-owned cars and cars furnished under contract to railroads by private or railroad-controlled car lines to enable such railroads to meet their obligations to furnish suitable equipment to shippers. The term "private car" is used to describe a car owned by, or leased, rented, or assigned to, a shipper for his exclusive use by a private or railroad-controlled car line.

Early in 1927, some of the railroads in western territory called the association's attention to the growth of the practice, by private-car lines, of leasing refrigerator cars to shippers, and painting the shippers' advertisements thereon. They stated that the practice caused unnecessary empty hauls, cross hauls, and uneconomical terminal services, and forced railroad equipment to remain idle.

After consideration, the association decided that the practice should be stopped. With that end in view, 10 meetings, beginning early in 1927 and extending over a period of nearly a year and a half,

were held, with representatives of private-car lines. On July 12, 1928, an agreement was reached, by which the private-car lines were obligated, inter alia, not to extend the practice of leasing cars, to discontinue the painting of advertisements on cars, and to remove such advertisements from cars then under lease, as soon as existing contracts expired. The car companies also agreed to furnish the car-service division of the association information as to contracts then in force. The preamble of agreement reads as follows:

Recently private line refrigerator car owners, and some railroads, have assigned refrigerator cars to individual shippers or industries for their exclusive use which have subsequently been painted with the industrial advertisements or trade marks. This has the effect of withdrawing such cars from general refrigerator car service, the promotion of uneconomical car handling and methods, also, such practice is not in harmony with the requirements of one of the established rules of the American Railway Association—Car Service Rule No. 12.

The agreement did not have the desired effect and, following further meetings to discuss the alleged violations of the agreement, the board of directors of the association April 22, 1929, adopted a resolution to the effect that, unless the efforts of private-car lines to supply refrigerator cars to shippers were discontinued, it would be necessary for the railroads to promulgate rules and regulations prohibiting the movement or acceptance in

interchange of all equipment containing shippers' advertisements. Copies of that resolution were distributed to all known private refrigerator-car owners and to investment bankers in Boston, Mass., New York, N. Y., Philadelphia, Pa., Cleveland, Ohio, and Chicago, Ill.

Further meetings followed but apparently without avail, and on May 7, 1931, the association addressed a letter to all railroads, private-car lines, and refrigerator-car builders quoting the following agreement of carrier-controlled lines:

It is agreed that railroad controlled refrigerator car lines will not lease refrigerator cars to shippers, provided all other private refrigerator car lines and car builders and railroads owning refrigerator cars will also agree to discontinue leasing or assigning such cars to shippers.

It was asked that they make a similar agreement. Because some private-car lines failed to do so, the association August 3, 1931, released those which had agreed. Failing by cooperative effort to stop the practice of leasing cars to shippers, the association took the matter up with the carriers operating west of Chicago to determine whether section 2, of the rule heretofore mentioned, should be extended to cover the western territory not embraced therein. Originally it was intended to make that rule effective only in western territory, but the eastern and southern lines, learning of the contemplated action, asked that the application of the rule be extended to cover the entire country. The proposed rule is the result.

The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers. The shippers are under no obligation to pay anything for the use of the cars and do not guarantee any mileage. Such contracts are hereinafter referred to as rental contracts, and the cars obtained thereunder as rented cars. The other form of contract in general use is similar to the rental contract, the only difference being that the owner of the car keeps all the mileage earnings. Cars obtained under the latter form of contract are hereinafter referred to as assigned cars.

The railroad-controlled lines generally did not indulge in the practice of leasing, renting, or assigning cars to shippers until about 1928. They had entered into contracts with various railroads under which they were obligated to furnish refrigerator cars in sufficient number to take care of the needs of all shippers served by such railroads. Certain private-car lines also maintained similar contractual relations with other railroads. Other private-

car lines were leasing, renting, or assigning cars to shippers served by such railroads, and the car lines which were under contracts to supply all necessary cars to shippers served by such railroads, as a matter of self-protection, adopted similar practices, not only with respect to shippers served by the railroads with which they had contracts, but with shippers located on other railroads. Consequently, we now find private and railroad-controlled lines bidding against one another to place cars in the exclusive service of shippers on or off the lines of railroads with which they have contracts. The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers. The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and the mileage earnings usually exceed the compensation paid the car owners by substantial amounts. Shippers' advertisements are painted by the car companies on cars furnished under all forms of contract. Such advertising is valuable to the shippers and, together with other alleged advantages hereinafter mentioned, derived from the use of private cars, are held out as an inducement to shippers to use assigned cars, and in addition to monetary benefits are also held out to the users of leased and rented cars.

The contracts are usually for one to five years, but some are for longer periods, and some for one

year, to continue until canceled. As far as can be determined from the record, rental contracts are not made by certain railroad-controlled lines or by some of the private-car lines. Except the monthly consideration for leased cars, shippers are not obligated to make any monetary payments or guaranties to car companies. The car companies repair and maintain the cars, and bear all other expenses involved in their operation, including in most instances, when desired by the shippers, the keeping of records of movements, supplying of information relative thereto to the shippers, preparation and submission to shippers of monthly statements showing mileage earnings on the various railroads, and the collection of such earnings. The shippers in most, if not all, of the rental and assignment contracts, are obligated to use the cars placed in their service in preference to all other cars, to use whenever possible other standard cars of the contracting car lines, and to give preference at all times to the rented or assigned cars for long-haul shipments in order to produce the highest possible mileage earnings for such cars.

The association shows that refrigerator cars owned by the railroads, decreased from 34,906 in 1923 to 24,685 in 1928, and 17,994 in 1933. Other evidence shows that this was due, in part, to the sale or lease of refrigerator cars by the railroads to railroad-controlled and private-car lines. Railroad-controlled refrigerator cars increased from 68,114 in 1923 to 111,649 in 1928, and 115,230 in 1933, making a total of 133,224 cars owned or con-

trolled by carriers in the United States in 1933. During the same period railroad-controlled lines retired 13,116 refrigerator cars and built new or rebuilt 49,557. Refrigerator cars owned by private-car lines increased from 5,162 in 1923 to 12,116 in 1927, and 21,652 in 1932.

The exhibit introduced by the association shows "packers," said to include "Armour Car Line, East Side Packing, Rath Packing, Swift, Cudahy Refrigerator Line, Hormel & Company, Morrell Refrigerator Line, Dold Refrigerator Line, Kingan Refrigerator Line, and Wilson Car Line," as having 15,902 cars in 1923, 19,469 cars in 1928, and 17,852 cars in 1932. Evidence introduced by others, however, indicates that some of the above-named packers do not now own their cars, but lease them from private-car companies. Whether there is any duplication in the cars shown as owned by the packers, and by private-car lines does not appear; but if the cars owned by the private-car lines which have been leased to shippers and are operated under the lessees reporting marks such as the 133 shown in the equipment register as belonging to Geo. A. Hormel & Company, but which are leased from the North American Car Corporation, are not included in the figures given for the private-car lines, the number of cars owned by the car companies is under-stated.

The following table, a reproduction of an exhibit introduced by the association, shows the loadings of dairy products on class I roads, as follows:

	1932	1931	1930	1929	1928	1927	1926	1925	1924	1923
	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars	Cars
Poultry, dressed <sup>1</sup> .....	23,279	23,916	23,286	23,522	20,468	22,683	22,634	19,704	20,775	19,827
Eggs.....	37,205	50,699	53,358	52,175	56,120	57,876	57,078	52,704	50,935	53,515
Butter.....	45,338	46,203	45,823	44,384	41,148	59,814	58,383	55,201	51,933	45,336
Cheese.....	12,008	13,840	16,876	18,729	19,871					
Total.....	117,830	134,658	139,343	138,810	137,607	140,373	138,095	127,791	123,643	118,678

<sup>1</sup> Dressed poultry is not shown as a separate item in I. C. C. classification prior to 1928. Figures for 1923 to 1927, inclusive, are arrived at upon basis of ratio of dressed to total poultry for the four years 1928 to 1931, inclusive.

A check at all stations originating dairy products on 10 western railroads disclosed that in 1925 31,274 carloads were loaded at 680 stations, and that in 1932 30,879 carloads were loaded at 683 stations.

The association concludes from the above figures that there has been no necessity for an increase in the refrigerator-car supply since 1927. An unsuccessful attempt was made at the hearing to find out from numerous witnesses whether perishable traffic as a whole has increased since 1928. None of the witnesses had any definite information. Some expressed the opinion that such traffic had held its own better than had most other commodities, and others that it had actually increased. None expressed the view that an increase in the supply of refrigerator cars was required to handle it.

A further check made on 7 of the 10 railroads referred to shows that of the carloads moving in 1925, 178 were in private cars. Other checks of car loadings of dairy products were also made. One made on six railroads that owned or obtained their cars from railroad-controlled lines, and which have fully taken care of the shippers' needs for years without calling on private-car lines, shows that 1,131 carloads of dairy products were moved in private cars during May, 1933. Another check made on seven railroads which owned their refrigerator cars directly or through companies they control indicates that shippers at 248 stations were using private and leased cars and that shippers at 540 stations were using railroad-owned and controlled cars. Another made on nine western railroads shows that at

167 stations some shippers were using railroad cars for dairy traffic, while other shippers at the same stations were using private cars. It does not appear whether the same carriers were used in each instance. Cars loaded by the packers heretofore named were not included as private cars in the above checks, and except when otherwise noted are not included when reference herein is made to private cars.

Investigation by the association disclosed that four concerns shipped 4,989 cars of feed, malt, sirup, soap, lard substitutes, starch, sugar, and corn sirup over a period of 3 months for one of the concerns and 6 months for the other three concerns in refrigerator cars between December 1931 and May 1932, inclusive. During the same period the same concerns shipped 4,458 box cars containing those commodities, which would indicate that the box car is satisfactory for the transportation of those commodities, with a possible exception as to some of the feed, as no definite information relative to its character was obtainable from the witnesses. To the extent that refrigerator cars were used for the commodities that did not require protection the same number of box cars, of which there are a surplus, were forced into idleness with added expense to the railroads.

The loaded mileage made by the refrigerator cars was 1,933,177 miles, and the empty mileage was probably about the same, making the total payments for mileage, on that business, for the 6 months, about \$77,327.08.

Most of the railroad witnesses admitted that there is some movement of nonperishable commodities in refrigerator cars over their respective lines, but, almost invariably, they stated that it consisted mostly of merchandise (less-than-carload) traffic moving toward the home of the car, or of carload traffic received in interchange. The vice president in charge of traffic of a carrier operating extensively in western trunk-line and southwestern territories disclaimed knowledge of any movement of nonperishable traffic in refrigerator cars, although he had previously signed a memorandum to the president of that railroad, reading in part as follows:

The East Side Packing Company, which operates 200 refrigerator cars, primarily to move their packinghouse products, has now served notice on us that in the future their purchase of salt from Jefferson Island, La., and Hutchinson, Kans., must be protected exclusively with their refrigerator cars and cars are being delivered to us at St. Louis empty for movement to those points for that purpose. The round-trip mileage paid these people, in this instance, is equal to approximately thirty percent of the revenue earned on the salt.

An exhibit filed subsequent to the hearing shows that this road moved 26 carloads of salt from Kanopolis, Kans., 18 from Hutchinson, and 26 from New Iberia, La., to St. Louis in refrigerator cars for the East Side Packing Company during the

period from February 17, 1931, to October 30, 1931, inclusive. Scattered movements of various non-perishable commodities in refrigerator cars from origins on other roads were also instanced. Practically all of the railroad witnesses testified that such use of refrigerator cars is discouraged, but that, if shippers using private cars load them with nonperishable commodities, they are accepted by the railroads, and many of them testified that, if a shipper insists on the railroad furnishing a refrigerator car for loading with a commodity not considered by the employees as requiring protection, he gets the car. The association's witness testified that he did not know of any railroad, because of competition, that would refuse to accept a carload of traffic that did not require protection because it was loaded in a private refrigerator car. Although advised in the notice of hearing that such information was desired, few witnesses were informed as to, or would divulge, the extent to which, their lines permit the use of refrigerator cars for shipments not requiring that type of equipment. Considering such evidence as we have, the reluctance of witnesses to give specific information, and numerous statements to the effect that the carriers would do anything not prohibited by law to get traffic, the conclusion is inescapable that the use of refrigerator cars for non-perishable traffic is very materially greater than appears definitely from the record.

The association maintains the carriers have always held themselves out to furnish refrigerator

cars to all shippers, except meat packers, several of whom have undertaken for years to take care of their entire requirements, and that it is the carrier's legal duty to furnish such cars; and that they are and must be prepared at all times to do so. It contends that the railroads, through ownership or contracts with railroad-controlled or private-car lines, not only have a sufficient number of cars, but cars of suitable construction, insulation, and size to meet their obligations. This, it claims, is demonstrated by the fact that they have done so in the past when the traffic was as heavy as at present and when they had fewer cars, and the fact that they are now transporting a large volume of perishable traffic of all descriptions, including dairy products, without complaint. Its position is that as a matter of self-protection the railroads must take steps to stop private-car owners from forcing upon them through leasing, renting, and assigning private refrigerator cars to shippers, which displace cars the railroads have provided for the business of such shippers. That practice involves payment of huge sums for mileage, and unnecessary empty hauls and terminal services.

Protestants' evidence—

Two witnesses testified on behalf of the Association of Creamery Butter Manufacturers and the Protective Association of Private Car Users. The witnesses are connected with two corporations dealing in dairy products and were not informed as to the operations of or the use of private cars by any of the other parties. On behalf of said organizations

they proposed a rule, hereinafter referred to as the shippers' rule, approved by the members thereof which they seek to have substituted for the suspended rule.

They contend that the suspended rule is ambiguous, unfairly discriminatory, improper, inappropriate, and destructive.

They contend that paragraphs (a) and (b) are objectionable, for the reasons that many carriers do not have any refrigerator cars, and the supply of those that do is insufficient; that cars lack uniformity as to dimensions and insulation and are frequently of an improper type of construction for the transportation of dairy products; that ordinary refrigerator cars are not in condition for the transportation of dairy freight either because of the absence of floor racks, defective floor-rack structure, or because they have been used for other lading that creates objectionable conditions; and that carriers are not in a position to accept the mandatory provisions of paragraph (a). The witnesses making those assertions had no knowledge regarding the construction, insulation, or condition of the cars owned or furnished by carriers to shippers. One witness said his remarks were not intended to apply to cars owned by private or railroad-controlled car lines and that if such cars were considered as railroad cars he did not know whether the supply is sufficient to meet the demands of all shippers but supposed that so far as the number of cars was concerned the supply would be ample.

A large majority of refrigerator cars furnished to shippers by the carriers are owned by private

or railroad-controlled car companies as is evidenced by the figures heretofore given. The railroad cars vary in size, type, and insulation, but so do the private cars used by the various dairy shippers and in some instances those used by one shipper. The floor rack is an essential part of the standard refrigerator car. The large majority which do not have them are private cars in the service of shippers of canned goods, candy, and probably some few other commodities, who have caused them to be removed. Some of those shippers were represented by the two witnesses raising that objection. The removal of the floor racks by such shippers is one of the conditions complained of by the association.

Paragraph (c) is said to be ambiguous, when considered in connection with other provisions of the rule, in that it would permit the use of private cars when no interchange is necessary. There is no merit to that contention as the use of private cars locally on one line is covered by paragraphs (a) and (b) relative to the furnishing of cars at origin points. The rule must be considered in its entirety.

The carriers by the exception admit their inability to furnish refrigerator cars for the transportation of all commodities of meat-packing companies, and, therefore, intend to permit those companies to continue to use cars acquired by them through ownership or otherwise. The protestants point out that the large packing companies also engage extensively in the dairy business, and that the use of private cars for such traffic would be an inducement to the independent packers scattered

throughout the United States who do not now handle dairy products to acquire cars and engage in that traffic to the further disadvantage of the dairy interests. They further contend that permitting the use of private cars acquired by packers other than by ownership does not prohibit arrangements such as the proposed rule seeks to eliminate, being made by such packers with car lines. It is also contended that the exception of the application of paragraphs (a), (b), and (c) to the packers is unduly preferential of them and unduly prejudicial to other shippers. That question will be considered hereinafter.

Paragraph (d) is said to be in conflict with paragraph (c) in that it makes no reference to cars received in interchange. This contention is without merit.

The shippers would eliminate the words "and will furnish" from paragraph (a) and the first sentence of paragraph (b), and substitute for the word "commodities" in the second sentence of paragraph (b) the words "particular traffic". They propose that paragraph (c) be changed to read as follows:

Carriers will accept empty refrigerator cars intended for loading on their lines only when the shipper has specifically arranged with them for such cars and when all parties have complied with these rules.

Exception: Inasmuch as carriers are not in position to furnish refrigerator cars suitable for the transportation of all commodities

nothing in these rules will prevent the use of refrigerator cars acquired by ownership or otherwise for the handling of commodities requiring protective service as described in Item 1130.

If cars are acquired by means other than ownership, it must be by bona fide lease at definite, reasonable remuneration to the owner and for a period of not less than three years.

They would eliminate paragraphs (e), (f), and (h) and change paragraph (d) by eliminating the words "gift, gratuity or" and defining the word "owner", as used therein, to include a lessee operating cars under his own reporting marks, and under a lease such as is described in the next preceding exception, and which lessee has control of his cars and the routing of his traffic, and insert a provision that no certificate would be required from an owner or lessee using cars exclusively in his own service. No change is suggested in paragraph (g).

The shippers' rule would have no appreciable effect on present practices. A shipper desiring to use private cars irrespective of his interest therein would only have to arrange with the carrier for their acceptance. The evidence is convincing that it would not be difficult for shippers to induce carriers to agree to accept such cars. They are now accepting them and there is no doubt that under such a rule they would continue to do so.

A shipper owning or leasing his cars for a period of three years or more would be permitted to use them without any previous arrangement with the

carriers. The requirement that the remuneration paid by the lessee to the car owner must be reasonable is indefinite. The witness who submitted the shippers' rule regards a reasonable remuneration as one sufficiently low to permit the lessee to derive a substantial monetary benefit from the mileage earnings. Further the approval by us of the proposed exception to paragraph (c) would be to deny to the carriers their undoubted right to furnish cars suitable to transport safely commodities which require protective service. This we may not do.

The two witnesses referred to, and the others for protestants, enumerate many alleged disadvantages in the use of railroad refrigerator cars, and alleged advantages in the use of private cars. It is alleged that railroad cars furnished are of "a hit and miss variety"; that the age, insulation, ice-bunker capacity, and dimensions thereof vary; that they are generally in bad condition in that they are not tight, have poorly repaired or broken floor racks, or none at all, protruding nails and bolts, and, if cleaned at all, are not properly cleaned; that they are frequently furnished after having been previously loaded with onions or other commodities, the odor from which permeates the car and renders it unfit for dairy products; that, in ordering a car, it takes from 10 to 12 hours or longer to get it placed; and that carriers object to shippers routing a car, ordered from one carrier, over the rails of another, with resulting losses of sales to the shippers. The above summation is of general statements unsupported by specific instances given with sufficient

definiteness to enable them to be identified or checked. Some of the witnesses based their statements on alleged experiences which occurred eight or more years ago. As will hereinafter appear, the weight of the evidence does not support these allegations in their entirety.

The advantages claimed in using private cars are uniformity in insulation and ice-bunker capacity; sufficient insulation to give protection to eggs against freezing in the coldest weather, uniformity of temperature in the cars on long hauls, and reduced icing costs; assurance of modern, clean cars in good repair; uniformity in, and selection of, desired dimensions; flexibility of movement; value of advertisements painted on cars; and profits derived from mileage paid by the carriers.

Several reasons, epitomized below; are assigned by protestants as to why the above-mentioned features are deemed not only advantageous but necessary to the prosperity of the dairy and other industries using private cars. Uniformity in insulation and bunker capacity enable the shipper to know how much initial ice is necessary and how many times, if any, shipments must be re-iced en route in all weathers to insure the necessary protection. When railroad cars are furnished, the insulation and ice capacity vary, with the result that a specific amount of ice used in one car with satisfaction, when used in another, fails to properly protect the lading. If the refrigerating qualities are not known, the only safe policy is to ice the car to capacity. The bunker capacity of railroad cars ranges from 5,000

to 10,500 pounds. Although a car with a 5,000-pound capacity may meet all requirements, if one of 10,500-pound capacity is furnished by the railroad, it is frequently, as a measure of safety, iced to 10,500 pounds, thus unnecessarily increasing the ice cost. The experience of the Pacific Fruit Express is not in accordance with this statement.

The sufficiency of insulation to protect eggs against freezing in all weathers was stressed by only one protestant, a shipper of eggs from the Northwest to New York, whose cars were specifically built for it by the North American Car Corporation. In contracting for private cars, a shipper is enabled to select cars that have been recently constructed or rebuilt, and knows that the refrigerating qualities thereof have not been affected by deterioration or abuse. Cleanliness of cars is assured when used by only one shipper and for only one class of traffic. Cars obtained under contract are kept in good repair at all times by the owning car companies. Therefore, the expense of a careful inspection by an experienced man, which is said to be necessary before it is safe to use a railroad car, is eliminated, and delays due to the removal of unsatisfactory cars and their replacement by others are avoided. A shipper using cars of uniform size knows the best method of loading them, so as to prevent shifting, with a minimum amount of bracing, and can use unskilled laborers satisfactory for that work. The laborers, having learned how to load one car, are enabled to load the others in like manner without experimentation, so

that labor costs are thus minimized. Private cars may be selected that will permit loading of package goods without any waste of space at the sides and with a minimum amount of such unoccupied space between the tiers at the doors, resulting in material savings in both materials and labor in bracing. Some shippers maintain that if the proper cars are selected there is no necessity for any bracing.

Excluding the packing industry, shippers of dairy products are the largest users of private refrigerator cars. Representatives of seven shippers of dairy products presented evidence in opposition to the proposed rule. They all contend that cars furnished by the railroads are not satisfactory for the transportation of dairy products for one or more reasons above stated, and that the use of private cars has reduced claims for damages to a minimum and has held the traffic to the carriers' rails. They either refused or failed to file copies of their contracts with the car companies.

The Fairmont Creamery Company stresses the contention that there is a material saving in expense and no shifting of lading, when private cars are used, because of their uniformity in size. The maximum amount of initial ice used by this concern is 4,000 pounds, and the saving in the cost of ice is said to be about \$4 per car. It ships eggs in straight carloads and in mixed carloads with other dairy products. About 35 to 50 per cent of its entire tonnage now moves in mixed carloads. The proportions of the several products in the cars vary.

A witness for one of the other dairy shippers tes-

tified that a standard egg crate measures 36 by 12.125 inches with variations up to 0.5 inch. Whether the boxes or crates in which butter, cheese, and dressed poultry are shipped are standardized does not appear of record, but those in which each of the products is shipped differ in size from those used for the others. Even if all of protestant's cars were the same size, which hereinafter appears not to be a fact, it is not clear, insofar at least as the mixed carloads are concerned, how the alleged saving in loading and blocking costs is accomplished or how the different cars can be loaded alike.

The Fairmont Creamery Company's plants at Grand Island and Omaha, Nebr., are on the tracks of the Union Pacific. It leases about 200 cars, 30 from the National Car Company, 30 or 35 from the North American Car Corporation, and the others from the North Western Refrigerator Line Company and the General American Tank Car Corporation or its subsidiaries. The equipment register shows that in January 1932 the Fairmont Creamery Company was operating 165 private cars; 120 of them have basket-type bunkers with a crushed-ice capacity of 9,700 pounds and five brine tanks with a crushed-ice capacity of 5,440 pounds. The 125 cars referred to are 32 feet 9.75 inches long and 8 feet 4.75 inches wide. Fifteen cars have basket-type bunkers with a crushed-ice capacity of 9,800 pounds and are 33 feet 10 inches long by 8 feet 2 inches wide. Twenty-five have brine tanks with a crushed-ice capacity of 5,440 pounds and are 30 feet 6 inches long by 8 feet 3.75 inches wide. Eighty-five of the

cars in its service January 1, 1933, were built in 1925 and 30 in 1922. The witness at the hearing agreed to file a statement showing the numbers of the cars leased by it and the dates they were built or rebuilt but has failed to do so. Consequently, more accurate or detailed data as to the size of its cars and their ice capacity are not available. If standard crates 26 by 12.125 inches were loaded eight wide, there would remain unoccupied a space of 3.75 inches in the cars 8 feet 4.75 inches wide, and 2.75 inches in those 8 feet 3.75 inches wide. The witness testified that his company needs cars 32 feet 8 or 10 inches in length and that cars 33 feet 0.5 inch, or 30 feet 6 inches, are not as desirable as those they now use, because they do not load as compactly, and because it would be necessary to load a 30-foot 6-inch car one tier higher. A 32-foot-8-inch car will take fifteen 26-inch crates lengthwise with 2 inches over. The 33-foot 0.25-inch car will take 15 crates with 6 inches over. The 33-foot 10-inch car will take 15 crates with 16 inches over, and the 30-foot 6-inch car will take 14 crates with 2 inches over. The usual load is said to be 400 crates. If loaded eight crates wide and three tiers high there would be a top load of 40 crates, if loaded 15 crates lengthwise, and 64 crates if loaded 14 crates lengthwise.

It is this protestant's present policy, when its commitments will permit, to lease cars from carrier-controlled car lines or private-car lines which have contracts with the railroads over which its shipments move. The same car lines would furnish it

with cars were the use of private cars stopped. It has recently endeavored to obtain enough leased cars to take care of its normal needs, so that it will not have to call on the carriers for cars except during spurts or peak movements such as for the Thanksgiving and holiday trade. It uses only two or three railroad cars a month.

The witness admitted he knew nothing about the type, condition, or suitability of cars now furnished for dairy products to shippers depending on the railroads for cars. The extent of his knowledge as to conditions since 1924 is that some carriers own or lease large vegetable cars, and have some old cars, and several personal experiences he had comparatively recently with cars placed by the railroads for his loading. On one occasion he had to have three cars placed before he obtained one suitable for dairy products. In the spring of 1932, protestant intended to use railroad cars for shipments from Moorhead, Minn., and Devils Lake, N. Dak., and did ship in 15 or 20 such cars but the lading was damaged upon arrival at Duluth, Minn.

Protestant pays \$45 and \$50 per car per month for its leased cars and receives mileage earnings of approximately \$32.50 per car per month in excess thereof, a profit of \$6,500 per month or \$78,000 per year. It says it must have the monetary compensation derived from mileage earnings as an offset to the lower truck rates and that reductions in rail rates would not be sufficient to hold the traffic to the railroads. It describes the establishment of truck-competitive rates as "vicious and unsatis-

factory" and says "it has a tendency to disturb the rate relation between commerce and rates." As an illustration the witness referred to a proposal of the carriers to reduce the rate from the Missouri River to Chicago from 69 cents to 30 cents. He says such a reduction would have the effect of bringing origin prices more nearly to the Chicago market prices and that, as a portion of the production within the territory where the origin prices would be increased would not be marketed at Chicago, the dairy shippers (presumably meaning the middlemen) would be compelled to pay the unaffected rail rate to destinations to which competitive rates were not established, in addition to the higher origin price.

The witness admits that the railroads, either by ownership or lease, have cars suitable and satisfactory for dairy loading and that they can operate and condition them as well as the private and railroad-controlled car lines. He says, however, if his firm is deprived of the use of private cars and the cars furnished by the railroads are clean, in good condition, and identical otherwise with its private cars its traffic nevertheless will be given to trucks.

The DeSoto Creamery and Produce Company ships dairy products from its main plant at Minneapolis, Minn., and branches at four other points in Minnesota, two in North Dakota, and three in South Dakota. The plants in Minnesota and North Dakota are on the Great Northern and Northern Pacific and those in South Dakota on the line of the Chicago, Milwaukee, St. Paul & Pacific. The

branches ship in carload and less-than-carload lots to the main plant and eastern destinations. The main plant ships principally to eastern destinations. For about two years this company has leased 20 cars from the Union Refrigerator Transit Company. It refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined. The leased cars are 33 feet long by 8 feet 4.375 inches wide and have a crushed-ice capacity of 9,200 pounds.

The Omaha Cold Storage Company is interested principally in the shipment of dairy products within and from the State of Nebraska. It has used private cars for about 10 years. About 8 or 10 months prior to the hearings, protestant became convinced that brine-tank cars were preferable for the movement of dairy products, and leased 55 such cars from the North Western Refrigerator Line for a period of five years at a fixed monthly compensation. The amount paid is not shown. The mileage earnings are collected by the car company and the entire amount thereof turned over to the protestant. Twelve of the leased cars are 33 feet 2.75 inches and 43 are 32 feet 9.375 inches long by 8 feet 4.375 inches wide. Prior to the leasing of the brine-tank cars it used 47 ordinary refrigerator cars assigned to it by the Union Refrigerator Transit Company.

The Jerpe Commission Company ships dairy products from points in Nebraska to New York. Prior to August 1932, it used 65 assigned private

cars. It desired cars with an ice capacity not to exceed 6,000 pounds, and, consequently, leased 35 cars from the North Western Refrigerator Line Company and 15 from the Dairy Shippers Dispatch at a fixed monthly rental which it refused to disclose. Ten of the leased cars have brine tanks. The witness stated that 10 of the cars have an ice capacity of 5,000, 10 of approximately 8,000 pounds, and the others 6,000 pounds, but that the car company agreed to reduce the ice capacity of those exceeding 6,000 pounds to that amount. The Equipment Register shows that as of July 1933 seven cars were 33 feet 2.75 inches long by 8 feet 4.375 inches wide and that 13 were 32 feet 9.375 inches long by 8 feet 4.375 inches wide.

The witness admits that the leased cars will not take care of its peak movements and explains that the difference between the number of cars previously assigned and those now leased is probably due to the fact that it had too many cars when they were on the assigned basis and that its business has fallen off. The evidence indicates that it is unusual for a private-car line to assign any more cars to a shipper than he can keep actively in service. In addition to the reasons assigned by other witnesses why the proposed rule should not be allowed to become effective the protestant points out that seven terminal railroads are not parties to the tariff and that there is nothing to prevent the use of private cars for shipments originating on their lines.

The Seymour Packing Company, with headquarters at Topeka, Kans., has 13 branch houses in that State. It ships approximately 2,000 carloads of eggs, frozen eggs in cans, and dressed poultry per year to destinations throughout the entire United States. Prior to 1927 protestant used railroad cars. From 1927 to 1930 at its request the railroad furnished cars obtained from the North American Car Corporation. Its experience showed that the latter were better than the general run of cars previously supplied by the railroads. In June 1932, it leased 40 cars from the North American Car Corporation for a period of 10 years at \$50 per month. The leased cars have an ice capacity of about 9,000 to 9,600 pounds. It contends that the smaller ice capacity of its private cars results in a saving in initial icing and in icing in transit. Its shipments are iced twice en route, with an alleged saving of \$4 on each re-icing. Egg crates when placed in storage frequently warp so as to require an additional space of from 2 to 2.75 inches in which to load eight crates wide in a car. Therefore, a car less than 8 feet 4.75 inches is said to be unsatisfactory for such traffic.

Priebe & Sons are dealers in dairy products, and have 52 packing plants in Kansas, Illinois, Iowa, Indiana, South Dakota, Nebraska, Wisconsin, and Minnesota. Because it deemed railroad cars unsuitable for the transportation of dairy products, the concern induced the North Western Refrigerator Line Company to build for its use 140 cars, 32 feet 9.375 inches long by 8 feet 4.75 inches wide, accord-

ing to agreed specifications. It is alleged that these cars were designed to save bracing, permit economical loading, afford transportation without damage, and to materially reduce icing bills. Protestant leases cars, sufficient to take care of only 75 per cent of its shipments, at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amounts paid the car owners. This protestant, like others, states that were it prohibited from using private cars its traffic, or a large proportion thereof, would move by truck.

The Beatrice Creamery Company was probably one of the pioneers in the use of private cars for dairy products. It has been using them since 1924. It originally owned its own cars but sold them because of difficulties encountered in operation. It now uses 80 cars assigned to its service by the Dairy Shippers Dispatch. It also has four leased cars for which it pays a fixed rental which is not disclosed. This protestant, like others, stresses the advantage of having cars of uniform size, but states that its assigned cars vary in length if not in width. The Equipment Register shows that the cars owned by the Dairy Shippers Dispatch are from 30 feet 6 inches in length to 30 feet 10 inches in length, and from 8 feet 1 inch to 8 feet 4 inches in width.

Washington Cooperative Egg and Poultry Association is an organization of 14,000 farmers. It has 17 branch houses in the State of Washington and 10 feed mills. Its principal market is New York. About 85 percent of its shipments travel 3,200 miles

or more. It loads 600 cases of eggs, averaging about 31,800 pounds to the car, instead of 400 cases generally loaded in western trunk-line territory.

Its plants are served by the Chicago, Milwaukee, St. Paul & Pacific, Great Northern, and the Union Pacific. Few shipments are moved over the Union Pacific, because that carrier refuses to accept private cars. Considerable testimony was given to show that protestant's private cars are far superior to any of the railroad or railroad-controlled cars in that they protect the shipments against freezing irrespective of the temperature, and in summer maintain a uniform low temperature with a minimum meltage of ice, while the railroad and railroad-controlled cars totally fail in both particulars. It claims that a uniform temperature of 40° should be maintained for the 11 days the eggs are in transit.

Because of difficulties and losses due to deterioration that it suffered when using railroad cars, it induced the North American Car Corporation in 1927 to build 150 cars, 33 feet 4 inches long by 8 feet 2.5 inches wide, with 3 inches of insulation at the sides and top and 2.5 inches in the floor; to install permanent racks extending 2 inches from the bunkers and 1.5 inches from the sides of the car, and to assign such cars to its service. The car is intended to permit loading of 15 cases lengthwise and 8 wide. The eggs are loaded from the ends towards the middle of the car and a V-shaped wedge is placed between the crates at the doors. The wedge is furnished by the carrier, but it was stated that a pro-

posal was being considered to charge the shipper \$2.50 per car for that bracing.

Originally all of the mileage earnings went to the car company, but in 1931 the protestant, learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged \$18.35 per car per month, and in 1932 were \$21.27 per car per month. The witness stated that if the association is deprived of the profits derived from mileage earnings it would consider sending as much of its traffic as possible by water.

The association also uses 40 assigned cars obtained from the Union Refrigerator Transit Company. These cars were remodeled in 1927 and are said to be satisfactory.

#### Packers—

George A. Hormel & Company, packers at Austin, Minn., was the only firm engaged in the meat-packing business that presented testimony in opposition to the proposed rule. Its plant is served by the Chicago, Milwaukee, St. Paul & Pacific and the Chicago Great Western. It ships fresh meat and packing-house products in private brine-tank cars, leased at \$50 per month from the North American Car Corporation. Most of the cars are equipped with beef rails. It states that cars furnished by the railroads are not suitable for its products and that,

therefore, it is necessary for it to use leased cars. In addition to the brine-tank cars it uses 30 mechanical-refrigerator cars. The evidence does not show the profit derived from the brine-tank cars, but the witness stated that the cost of using leased cars and the mechanical refrigerators, which includes refrigeration during the last 10 years, exceeded the amount received in mileage by \$24,690.60.

**Canned goods—**

Stockley Brothers & Company and associations of canners in Wisconsin and Minnesota were the only shippers of canned goods that presented evidence. Edible canned goods are listed in item 1130-D of the perishable protective tariff as articles that require protection against cold, and as not requiring ventilation. It is generally acknowledged that in cold weather some protection against freezing is necessary. Refrigerator cars answer the purpose. In warm weather, protection of the contents of the cans is not required, but the use of refrigerator cars the year around has become quite general for the purpose of preventing rusting of the cans and discoloration of labels resulting from condensation of moisture due to sudden changes in temperature. One witness stated that a change of 25° in 30 minutes is sufficient to cause such damage, but was unable to explain why canned goods stacked in warehouses are not similarly affected. A large volume of canned goods now moves in box cars, and it seems to be the concensus of canned goods shippers and the view of some of the railroad witnesses that

the exclusive use of refrigerator cars materially reduces claims for damage to shipments of this description. Cars with the floor racks removed cannot be used for traffic requiring refrigeration, but as canned goods do not require such protection it is a common practice<sup>2</sup> for shippers thereof using private cars, to remove the floor racks from the cars. They thus save the expense of handling the racks when cleaning the cars and obtain an even floor without openings.

There is a substantial standardization of cans, but frequently one commodity is packed in cans of two or more sizes and different commodities in cans of varying sizes. All cartons or boxes contain the same number of cans, however, so that the dimensions of the boxes vary with the size of the cans. Shipments are usually in mixed carloads, yet the witness, like the shippers of dairy products, and for the same reasons, stressed the desirability of cars of uniform dimensions.

Stokley Brothers & Company are growers and canners of fresh vegetables. Van Camp, Incorporated, a subsidiary of Stokley Brothers & Company, is a canner of vegetables. The latter company has farms covering 60,000 acres on which they raise fresh vegetables that are shipped to their canning plants located in Wisconsin, Indiana, Delaware, and Tennessee. The only movements of fresh vegetables shown are those of carrots under refrigeration from east Tennessee to Wisconsin and cabbage from Wisconsin to Indiana. When fresh vegetables are ship-

ped, the floor racks are retained in the cars, but when canned goods are loaded the racks are removed. About one fourth of protestant's traffic moves to the Pacific coast and contiguous territory, one fourth to the Southwest, one fourth to Central Freight Association territory, and the remainder to western and eastern trunk-line territories. It has 200 assigned cars obtained from the North Western Refrigerator Line Company.

The witness stated that it is immaterial to his company whether it uses private or railroad cars, provided the cars furnished by the railroads are in good condition, properly insulated, and uniform in size. Its assigned cars are painted with its advertisements, but it considers such advertising of little value and would not object to its prohibition.

The Southern, which serves its plant in Tennessee, objects to the use of private cars. During the summer, shipments therefrom are made in box cars. Claims for damages on shipments moving from that plant are eight times greater than those from all of the plants at which private refrigerator cars are used.

Wisconsin Canneries Association is an organization of operators of 120 canning plants in Wisconsin. There are 153 plants in that State. The normal production of its members is about 14,000,000 cases per year. About one half or two thirds of its traffic moves in excess of 250 or 300 miles to destinations east of Chicago. The heavy movement is between January 1 and July 15. The witness stated that

refrigerator cars are not necessary for the transportation of its products, but that they are desirable especially in the fall, winter, and spring, and that shippers and carriers generally insist on their use for the reasons hereinbefore stated. He stated that box cars are further objectionable in that they are generally dirty, contain protruding nails, retain injurious odors, cause unnecessary claims against the railroads, and prevent the goods reaching destination in first-class condition. About 10,000 to 40,000 carloads per year move out of Wisconsin, approximately 25 percent of which is in assigned cars with the shippers' advertisements painted thereon. The assigned cars are obtained from the same car company that furnishes the cars used by the railroad which would otherwise furnish cars to protestant. The only advantage derived from the use of private cars is the advertising stenciled thereon. There is a substantial movement in box cars, but after September 15 the large majority of the traffic moves in refrigerator cars.

Minnesota Cannery Association is an unincorporated association of 10 or 11 operators of canning plants in Minnesota. Its annual pack of corn and peas is about 3,500,000 cases. It ships to all parts of the United States and to the same destinations as does the Wisconsin Association. About five or six of the Minnesota plants use private cars. The witness stated he was not definitely informed as to the terms on which the cars were acquired, but he believed that one of the shippers leased cars for a

monthly rental of \$45 per month and that the others used assigned cars. He stated that none of the members of the association desired to make a profit from mileage earnings, that the only inducement to them to use private cars is the advertising thereon, and that if that were prohibited the use of the private car, so far as his principals are concerned, would be discontinued.

Candy—

The Curtis Candy Company was the only candy shipper that presented testimony in opposition to the proposed rule. It ships 1-cent and 5-cent candy bars from three plants in Chicago to destinations in all sections of the United States both in box and refrigerator cars. Refrigerator cars do not move under ice. When refrigerator cars are used, the floor racks are removed, because it is stated that uneven slats and the spaces between them damage the cartons and contents. The witness, like the dairy and canned-goods shippers, stresses the desirability of having cars of one size. Its products are packed in 15 or 20 different sized cartons. It admits that few, if any, cars contain candy of only one kind or cartons of one size. As a general rule the number of cartons of each size varies in every carload. Most of its carload shipments consist of consignments for from 15 to 20 customers usually billed to a warehousing company for distribution. About one third of its output moves in assigned cars obtained from the Northern American Car Corporation. It considers advertising on the cars valuable and says

that were it discontinued its traffic would probably be given to the trucks.

### Private-Car Line Protestants

The North Western Refrigerator Line Company, Western Refrigerator Line, and North American Car Corporation are the only car lines, either private or railroad controlled, that presented testimony in opposition to the proposed rule.

The North Western Refrigerator Line Company and the Western Refrigerator Line are corporations organized November 19, 1925, and in 1929, respectively. The witness is president of both companies. The investment in those companies is approximately \$10,000,000, one half of which is owned by small investors. The witness alleges that should the proposed rule become effective it would limit the activities of private lines so that "the initiative development of better instrumentalities would be forestalled, the capital invested destroyed, contractual relationships interfered with, and service interfered with to the detriment of future foodstuffs of the United States." The private-car lines have been instrumental in all advances made in specialized equipment and the railroads have adopted such equipment only after its practicability has been fully established by the private lines. It is also alleged that the private-car lines are an absolute necessity, as without them the commerce of the country could not be handled, and that the use of their cars is profitable to the railroads, since they could not maintain sufficient cars to handle the traffic at anywhere

near the present cost of 2 cents per mile plus such additional charges as the private-car lines receive for special services.

The witness urges that there is no such thing as a refrigerator car suitable for general service, that it is necessary that cars be adapted in construction to the commodities to be transported, the territories in which they are to be used, lengths of haul, and, in size, to the commercial units of the various commodities. The Western Refrigerator Line owns 498 cars, all of which are leased to the Green Bay & Western and its subsidiaries. The witness states that those cars are used in general service, except that the floor racks have been removed for the transportation of canned goods, canned sauerkraut, and one or two other similar package goods. The witness explains the seeming contradiction by the statement that there is not a very wide variety of commodities originated on the Green Bay & Western, and that practically no dairy products, other than cheese, originate thereon. The traffic manager of the Green Bay & Western testified that it originates a large quantity of dairy products and that the shipments thereof from stations on its line have increased to a remarkable extent because of the establishment of new industries. He testified that the cars leased by his line are suitable for all kinds of traffic, are of good construction and maintained in firstclass condition at all times, and that the shippers are entirely satisfied with their condition and the service rendered.

The North Western Refrigerator Line Company has 3,100 refrigerator cars, 2,378 of which are leased to the Chicago & North Western and the Chicago, St. Paul, Minneapolis & Omaha, hereinafter referred to jointly as the Chicago & North Western. The witness states that this company can furnish all cars necessary to take care of all perishable commodities originating on the Chicago & North Western. The car company cleans the cars furnished by the carrier, and these cars are all thoroughly inspected and in clean and suitable condition for the transportation of the commodities for which they are ordered when placed by the carrier.

The refrigerator line has 121 contracts with shippers for leased or assigned cars. It has 36 leases for a total of 459 cars at from \$37.50 to \$50 per car averaging \$40.69 per car per month. There are 120 cars on the assigned basis. The North Western Refrigerator Line Company has only supplied shippers with private cars since 1930, but since that date it has furnished them to shippers, not only on lines other than the Chicago & North Western, but also on that line. It says it was forced to take action because other car lines were doing so. It says that if it could keep other car lines from leasing cars to shippers on the Chicago & North Western the demands of that carrier would require all the cars the car line now owns. The witness states that in normal times he would favor a rule prohibiting the leasing or assigning cars to

private shippers; but that during the last three or four years he would not have favored such a rule, because the income derived from dealing directly with the shippers has been acceptable if not profitable.

The witness states that the principal objection he has to the proposed rule is that it is discriminatory. He is not objecting to it on the ground that it is unduly preferential of the packing industry or unduly prejudicial to the dairy interests, but his allegation of discrimination is based on the theory that it gives one car owner a preference (presumably meaning the packers) not enjoyed by others. He states that if that were eliminated he would approve the rule. Sections 2 or 3 of the Interstate Commerce Act prohibits undue preference or prejudice and unjust discrimination between shippers, and are not intended to apply to contracts made by carriers with parties who are not shippers for the furnishing of equipment.

North American Car Corporation owns or controls 2,200 refrigerator cars. It has a joint contract with the New York, Chicago and St. Louis and the Delaware, Lackawanna & Western for 299 brine-tank cars built especially for the transportation of dairy products, and contracts with about 50 shippers. Approximately 20 percent of the latter are for assigned cars and the others for leased and rented cars. All of its cars are either leased to the two carriers named or to shippers, or are assigned to the service of shippers, except 500 which were idle at the time of the hearing. The

testimony of this protestant is of the same general character as that of the witness for the other two protesting car lines.

### Protesting Carriers

A committee of six officials of their traffic departments was selected by the protesting railroads to present testimony in opposition to the proposed rule. The testimony of all of these witnesses is along the same general lines, and that part thereof which deals with the necessity for, and advantages derived from, the use of private cars follows closely that of the witnesses for the protesting shippers. The testimony of the chairman of the committee is fairly representative of that of the other members. It was concurred in by them although they were not all in accordance with it in every particular. Only the testimony of the chairman will be reviewed at length herein, and only that part of the testimony of the others which brings out facts relating particularly to the respective roads by which they are employed, or which differs from that of the chairman of the committee, will be discussed.

The vice president in charge of traffic of the Chicago & North Western was chairman of the committee referred to. He shows that the protesting roads originate 80 percent of the dressed poultry, 65 percent of the eggs, and 75 percent of the butter originating in the United States.

He contends that the tariff is ambiguous in that it has been and will be interpreted differently by representatives of different roads and that it is

discriminatory as between dairy shippers and packers in that the packers actually ship the same products in competition with the dairy shippers. Although considerable argumentative testimony was introduced for the purpose of sustaining these contentions, the witness admitted that if all ambiguity, discrimination, and other features of the rule criticised by him were eliminated he would still protest against it just as strenuously on the theory that it will handicap the carriers in competing with trucks and because the shippers of dairy products have advised him that if it goes into effect they will give their traffic to the trucks. Considerable testimony was introduced showing that the trucks have taken a large quantity of this traffic from the rail carriers, and that it is desirable traffic because of its high value and because it moves in packages fairly uniform in size. It is his contention that leased or assigned cars help to hold the traffic to the rails in that they are better suited in size to the loads; that, being confined to one particular traffic, they are generally cleaner and need less preparation and remodeling; that they are available to shippers for movement outbound over any line, and because the profits derived by the shippers from the mileage earnings are a material factor. The witness testified that he saw no objection to a refund by a car owner to a lessee-shipper of mileage earnings in excess of the rental charge upon a leased car; the lessee-shipper thus making a profit from the mileage paid by the carriers under the governing tariff. He

said, further, "I think it is one of our best pulls against the truck." He stated that his ideas as to the necessity for special equipment for the movement of particular commodities had changed since he heard the testimony of shippers. The witness stated he is not a practical car man and that he does not know what cars are suitable for different commodities. He had no idea what proportion of the dairy products loaded on his line moved in private cars or what proportion moved in cars furnished by the railroads, and did not know the construction, condition, size, or any other facts relative to the cars now furnished to shippers by his line or any other carrier. In this particular attention may well be given to the testimony of the president of the North Western Refrigerator Line Company as to the condition and number of the cars now in the service of the Chicago & North Western.

The superintendent of car service of the Chicago & North Western called as a witness testified that the use of private cars entailed additional handling and expense and, from an operating standpoint, disregarding the effect on the procurement of traffic, that the use of private cars should be prohibited. He expressed the view that were it not for competition with other railroads the carriers would insist on the use of their cars. He also testified that the cars furnished by his line are in as good condition and as suitable for the transportation of dairy products, so far as he has been able to ascertain, as the private cars that the shippers are

new using and that the railroad can and does see that they are clean when placed. He estimates that approximately 75 percent of the dairy products originating on the Chicago & North Western is now moving in cars owned and operated by the North Western Refrigerator Line Company.

The Chicago & North Western pays the car company 1.5 cents per mile for the cars it has under lease and 2 cents per mile on cars leased by the car company to shippers. The railroad does not lease any cars to shippers, but it assigns cars to shippers of potatoes during the months from September to April and paints their advertisements thereon. The so-called assigned cars are not restricted entirely to the service of particular shippers. During the other months of the year the cars are put in the general service of the railroad.

During 1932 the Chicago, Rock Island & Pacific originated 1,652 cars of dairy products that moved in private cars and 1,924 that moved in cars owned or leased by packers. A survey made at 35 of the more important dairy-product shipping points on the Rock Island in Iowa, Missouri, Minnesota, South Dakota, Kansas, and Nebraska in March and April 1933 showed that 2,075 carloads moved therefrom by truck which formerly moved by rail. The movement in private equipment or that furnished by the railroad is not shown.

The Rock Island previously owned its own refrigerator cars but recently sold them to the General American Tank Car Corporation and now secures all of its refrigerator cars from that com-

pany on the regular mileage basis. The witness stated he doubts the ability of the General American Tank Car Corporation to furnish suitable cars in sufficient number to take care of the traffic originating on the Rock Island. The witness for the car line testified that it has sufficient and suitable cars to take care of all such traffic. The witness for protestant stated that he had no knowledge of the character or number of cars owned by the General American Tank Car Corporation or furnished by it to the Rock Island. The witness appeared doubtful of the ability of the railroad to see that proper cars are placed for loading, but stated that he thought that today, excepting the shippers now using private cars, the railroad is meeting its obligations in that respect. The witness did not know how many private cars are now being used by shippers located on the lines of the Rock Island.

The superintendent of transportation, another witness, stated that respondent could obtain an ample supply of refrigerator cars from the General American Tank Car Corporation to meet the requirements of shippers on its line; that the cars available are suitable for the transportation of dairy products and are now being used for that purpose; that when shippers of eggs request cars of specified sizes the matter is brought to the attention of the car line, which immediately arranges to comply therewith; and that he would not oppose the rule if it were applicable on all competing railroads.

The Chicago, Milwaukee, St. Paul & Pacific is one of the principal originating roads of dairy

products. It has a contract with the Union Refrigerator Transit Company for approximately 3,000 cars and as many more as may be necessary to supply its needs. The witness states that the Union Refrigerator Transit Company is able to meet all demands made upon the railroad for refrigerator cars. In 1931 it handled 17,814 cars of dairy products. The proportion thereof that moved in private cars is not shown.

The witness makes the novel contention that the use of private cars promotes efficiency in that it obviates the necessity of carriers at competing points each retaining a supply of railroad refrigerator cars on hand to meet the demands of the shippers. He admits that, under the present practice, they maintain cars at such points for the purpose of taking care of shipments in excess of those that can be handled in shippers' private cars. The witness did not know whether the cars furnished the railroad by the car line are in as good condition as the private cars, or whether they are just as suitable for the transportation of dairy products. In fact he had little, if any knowledge of the construction, condition, or any other facts relative to the cars owned by the contracting car company.

An operating department witness for this carrier testified that "the U.R.T. Company furnishes a standard refrigerator car in first-class condition. This car is suitable for the loading of perishable commodities." Asked as to whether the cars of the Union Refrigerator Transit Company leased to

shippers by that car owner were of the same type and design as those leased to the carrier, this witness replied that "most of the cars are of the same type and some are the identical cars that were used in the Milwaukee assignment before they were transferred to shippers assignment by the U.R.T."

The Chicago, Burlington & Quincy owns the Burlington Refrigerator Express Company an independent corporation, which has the same officers as the Fruit Growers Express, Western Fruit Express, and National Car Company. A working arrangement with those companies gives it access to 29,000 refrigerator cars. It can meet the demands of all shippers on its road except those of the packers for brine-tank cars, and the cars furnished by it are suitable for the transportation of dairy products and other perishables. It considers that in some respects the present practice of leasing, renting, and assigning private cars is objectionable and states that some changes should be made, but it opposes the proposed rule through fear that some of the shippers of dairy products may use trucks if the use of private cars is prohibited. It prefers a rule that permits the leasing of cars to shippers, and opposes the rental form of contract under which the shipper is not obligated to pay a fixed amount and receives part of the mileage earnings. According to the witness's theory the propriety of the practice which permits a shipper to receive mileage depends on whether he has his reporting marks on the cars. The witness stated the rule proposed by the shippers is

a step in the right direction. The Northern Pacific owns and operates its own refrigerator cars but it also has a contract with the Northern Refrigerator Car Company to augment its supply when necessary.

Of late years the Northern Pacific has been able to supply all refrigerator cars ordered by the shippers on its lines. The witness stated that it has had no complaints from the shippers of fruits and vegetables, but that it has had complaints from shippers of dairy products relative to the dimensions of the cars furnished. The witness stated that if the railroad insisted on the use of its cars it would not get the dairy traffic because, whether the cars furnished by the railroad are satisfactory or not, the shippers consider that they are not, and that, under present conditions, every inducement must be offered to them to hold their traffic. Protestant takes the position that it has nothing to do with arrangements made by private-car companies and shippers.

The Great Northern owns the Western Fruit Express, an independent corporation, with which it has a contract to furnish all refrigerator cars required by the carrier. The Western Fruit Express owns about 7,000 cars and through this arrangement the Great Northern can meet all requirements of shippers of perishable goods originating thereon. It can furnish cars suitable and in good condition for the safe transportation of all perishables. Notwithstanding this Protestant advocates a continuation of the present practice of

leasing and assigning cars to shippers for the purpose of retaining the dairy traffic to its rails. The witness differs with the chairman of the committee in that he states that his railroad, through its contract with the Western Fruit Express, would be able to furnish different types of cars to meet the requirements of the various commodities, except brine-tank cars, to take care of the meat packers' traffic. The Western Fruit Express does not lease or assign cars to shippers on the Great Northern, but other car lines do. It has cars suitable for transporting eggs from the Pacific Northwest identical with those used by the Washington Cooperative Egg and Poultry Association and protestant accepts private cars for this traffic because of competition. The competition is said to be with water and truck carriers and other railroads, although truck competition is not a material factor.

In Finance Docket No. 10458, division 4 approved May 7, 1934, an application filed by the Great Northern under section 203(a), clause (4), title 2, of the National Industrial Recovery Act, for approval of a loan of \$850,895 to finance the cost of repairing and rebuilding series 49000 to 49999 refrigerator cars. The cars are to be used, among other things, it is stated, to handle approximately 2,000 cars annually of eggs, the principal shipper being shown as the Washington Cooperative Egg & Poultry Association. In view of this action it is difficult to understand the position of the Great Northern in the instant proceeding.

The car company receives the mileage. It also performs the icing and protective services for which it receives the published charges for refrigeration or protective service and any other charges over and above the freight rates provided by the tariffs. If the tariffs do not provide for such charges, the railroad company is required to pay the car company \$5 per loaded car for all traffic originating on the railroad, whether moving in cars belonging to the car company or other refrigerator cars. The \$5 charge is paid whether the cars are operated on a mileage or per diem basis.

It has also a contract with Safety Refrigerator, Incorporated, obligating the car company to furnish cars equipped with automatic refrigerating devices provided the facilities of the car company will permit. The carrier is obligated under that contract to pay 2 cents per mile mileage and to collect and pay to the car line the amount shown in the car line's schedule of charges for protective service on shipments originating at and terminating on its lines. The carrier's tariffs publish a refrigeration charge for the use of such cars and provide that such charges shall accrue to the carrier.

Representatives of the committee, other than the chairman, as well as traffic witnesses for other protesting lines, reluctantly admitted that they joined in the request for suspension largely because their competitors had done so. The Chicago & North Western apparently was the first to protest, and because of competition and traffic pressure others fell into line.

The Green Bay & Western also appeared as a protestant. Neither the Green Bay & Western nor any car line leases cars to shippers on the Green Bay & Western. The latter, however, has assigned cars to the service of 10 or 12 shippers whose advertisements are painted thereon. Protestant objects to the proposed rule only because it prohibits the maintenance of such advertisements on the cars. It says that the advertising causes no extra or additional service, as the shippers to whose service the cars are assigned do not object to them being used for other traffic or by other shippers even when the assignee has to use other cars, and that no shipper on its line objects to using cars with another's advertising thereon.

**-Other carriers' testimony.**

The Texas & Pacific has a contract with the Northern Refrigerator Car Company for the movement of bananas from New Orleans and with the American Refrigerator Transit Company to supply the necessary cars for the movement of all other perishables. The witness states that the cars furnished are suitable and satisfactory and that the railroad pays only the published mileage rate.

Comparatively few private cars were in use at the time of the hearing. It was said that the practice was just commencing. Some of the private cars are obtained by the shippers from the American Refrigerator Transit Company and are identical with those which would otherwise be furnished by the carrier.

The St. Louis-San Francisco has a contract with the Merchants Dispatch Transit Company obliga-

ting the latter to furnish sufficient cars of suitable type to take care of all shipments of perishables originating on its line, except those of the meat-packing companies. The St. Louis-San Francisco does not undertake to furnish cars for the movement of fresh meat from the packing houses. It states, however, under its contract, it could procure enough cars to move all products shipped by the packing companies, except fresh meat. The refrigerator cars furnished vary slightly in size, but the carrier is generally able to supply cars to meet the requirements of its shippers. The cars, when set for loading, are clean and in good condition. Before being placed they are inspected both by the car company and the railroad company for the purpose of determining whether they are clean and suitable for handling the highest class products and whether the lining, bunkers, hatches, and doors are in good condition.

Private cars are used on the St. Louis-San Francisco principally for the movement of eggs and dressed poultry. Some of these cars are furnished by the Merchants Dispatch and are no different from the cars previously furnished by the railroad to the same shippers. About 400 carloads per year move in private cars and about 4,600 carloads in railroad cars. The return of empty private cars is expedited and, in one or two instances, requests have been made to precool cars while in transit in order to have them available when they reach destination. The witness stated that the precooling of private cars is becoming an important question.

The Minneapolis, St. Paul & Sault Ste. Marie owns 811 refrigerator cars, 600 of which are in active service. It has a contract with the Union Refrigerator Transit Company to furnish 600 cars and such additional cars as may be necessary to take care of the carrier's needs. The railroad controls a sufficiently large supply of refrigerator cars to take care of all shipments originating on its line except brine-tank cars used by the packers and for dressed poultry. During the last few years a number of shippers on the railroad have had advertisements painted on cars which bear the reporting marks of the private-car company that owns them. This practice is increasing. Only one shipper uses leased cars with his reporting marks thereon. A considerable volume of dairy products originates on respondent's line and moves in the cars which it furnishes. These cars are stated to be suitable and complaints are few. Occasionally demands are made for cars of specified sizes. When such requests are made the carrier endeavors to comply with them. Only one of two shippers of canned goods use private cars. There are quite a few instances where shippers request the carrier to move refrigerator cars from their home plants to other stations for loading with canned goods and dairy products. No charge is made for such empty movements and the railroad pays the published mileage rate.

The Wabash and the Missouri Pacific own all the stock of the American Refrigerator Transit Company, which, under contract, furnishes all refig-

erator cars required by the Wabash. The supply is greatly in excess of the carrier's needs. During the month of May 1933, seven shippers of dairy products and canned goods loaded 128 private cars on the Wabash. During that month there was an average daily surplus of 362 railroad refrigerator cars on its line. On July 28, 1933, there was a surplus of 1,573 American Refrigerator Transit Company cars stored on the rails of the Wabash. During the first 4 months of 1933, the car line named owned an average of 12,290 cars, about 4,000 of which were idle. During 1931, the Wabash paid to 23 users of private refrigerator cars, exclusive of packers, mileage for 6,025,288 miles. In 1932, when there was a materially smaller volume of traffic, it paid 49 users of private refrigerator cars, exclusive of packers, for 17,757,001 miles. The number of private refrigerator cars is constantly increasing. Because of that fact the Wabash has not been able for more than two years to furnish any American Refrigerator Transit cars to some of the largest plants on its line.

The witness states there would be marked economy in operation if American Refrigerator Transit Company cars were used for traffic originating on the Wabash instead of private cars. The figures given above, relative to the use of private cars, do not include traffic from large terminals such as Chicago, St. Louis, Kansas City, and Detroit.

Prior to 1932, potatoes from points of origin on the Wabash were handled in stock or ventilated box

cars. In 1932, 167 carloads moved in refrigerator cars. The shippers maintain that refrigerator cars prevent shrinkage. The carrier complies with the shippers' demands for such cars, although it states that their use results in lighter loads, more cars, more dead weight to handle, and increased terminal costs. The witness stated that there is a material movement of commodities in refrigerator cars throughout the year, which during many months do not require such protection but that the Wabash is compelled to move private refrigerator cars loaded with such nonperishable traffic, or lose it to competing carriers.

The cars in the service of the Wabash are suitable for the transportation of dairy products and all other perishables. A considerable quantity of perishable commodities of all descriptions moves in them without any serious complaints as to the condition or suitability of the cars.

The Missouri Pacific has a contract with the American Refrigerator Transit Company under which the car company is required to furnish refrigerator cars suitable according to competitive standards in sufficient number to enable the carrier to accept with reasonable dispatch and carry all fruits, vegetables, dairy products, and other commodities requiring movement in such cars. The car company is obligated to perform the icing or heating service, for which it receives published tariff charges and, on cars moving under ventilation, the amount provided in the tariffs or, if no such provi-

sion is contained in the tariffs, it receives \$3 per car.

The car line is fully meeting its contractual obligation and is able to furnish cars necessary to transport all perishable traffic originating on the Missouri Pacific, except that of the packers. In 1932 approximately 3,000 carloads of perishable traffic moved in private cars. The witness expressed the opinion that the increased use of private cars did not result in a corresponding decrease in the use of railroad cars because the rail carrier would lose the traffic if the use of the private cars were discontinued, irrespective of whether it furnished suitable cars or cars identical with the private cars.

Prior to June 30, 1933, the Missouri-Kansas-Texas owned 199 refrigerator cars. It leased them to the General American Tank Car Corporation for 10 years. The contract provides that the General American shall keep the cars in repair and pay \$15 per month rental therefor. It also provides that the cars are to be retained in the service of the railroad and that the car company is to receive the mileage earnings and any charges that may be provided in the tariff for the use thereof. It contains no provision for the rebuilding or improvement of the cars, but provides for their withdrawal from service under certain conditions. The car company is obligated to supply cars of its ownership in addition to the cars it leases from the carrier to meet the demands of the railroad to the extent of its ability. At the present time the carrier is using cars leased

from the North American Car Corporation for the transportation of bananas, but it has the option of requiring the General American to supply such cars. The contract also requires that the railroad shall cooperate with the car company to influence the use of the car company's cars by shippers to the extent that it can do so without causing the railroad company to lose traffic through its refusal to accept private cars or cars of other ownership.

The testimony as to the ability of the carrier to furnish cars in sufficient number and suitable for the transportation of perishable commodities originated by it is somewhat contradictory. It is to the effect that, prior to July 30, 1933, it had a sufficient number of suitable cars, except during certain seasons of the year when the movement of some commodities was heavy. It had no contract with any private or carrier-controlled car line to supply the shortage. It depended at such times on cars originating on the lines of other carriers and unloaded on its line. The witnesses also stated that, at the present time, it is in position to meet the demands of shippers for cars of specified sizes or types, but that they are not sure that it could take cars of all perishable traffic offered without the use of private cars. They stated that the carrier originates little perishable traffic other than dairy products, but that the latter is an important item. As will hereinafter appear, it is the testimony of the General American Tank Car Corporation that it can furnish sufficient cars to enable all its contract lines to take care of all de-

mands for the transportation of commodities requiring protection in refrigerator cars, except the traffic of the packers.

### Illinois Central

The Illinois Central owns 5,933 refrigerator cars, 525 of which are equipped for service in passenger trains. About 1,300 have been rebuilt in the last two years. The insulation on the rebuilt cars is 2.5 inches and on the others 1.5 inches. There are 2,500 that have adjustable ice racks so that the ice may be carried above the load, giving modified refrigeration. Except during the spring-vegetable movement and the summer-peach movement, the Illinois Central has a substantial surplus of refrigerator cars. For a period of several weeks between March 15 and July 15 it leases 2,000 cars from the Northern Refrigerator Car Company and, during the period from July 15 to March 15 it leases 500 cars to that company for operation on other railroads. It has an ample supply of refrigerator cars on hand at all times to transport all perishable commodities, including dairy products, originated on its line. It does not lease or assign cars to private shippers, but about 10 shippers on its lines use such cars obtained from private-car lines. The Illinois Central was one of the protestants. The witness, the general superintendent of transportation, was not informed as to the reasons the carrier protested, but, as an operating man, stated that he thought the proposed rule was a movement in the right direction, but that it had some defects which he hoped would be rem-

edied as a result of the hearing. He was under the impression that dairy products moved under intensive refrigeration, and, therefore, as the Illinois Central does not own brine-tank cars, that its equipment would be unsatisfactory. He stated, however, that dairy products are moving in the railroad's cars, and that there have been no complaints as to the efficacy of their refrigerating qualities. One or two shippers of eggs complained that the cars were too long and the railroad installed false ends in order to meet their objections.

The St. Louis Southwestern does not own any refrigerator cars and has no contract with any car line to furnish such cars. Practically no dairy products originate on its line and the season during which other perishables originate thereon lasts only about three or four weeks. It obtains the cars necessary for such traffic from its connections.

The Southern Railway owns stock in the Fruit Growers Express and, although it has no formal contract with it, obtains the refrigerator cars necessary to take care of the perishable traffic originating on its line from that car company, under a general understanding, except that the Northern Refrigerator Car Company furnishes some cars for the movement of bananas from New Orleans. No shippers on its line use private cars, and it discourages the use of refrigerator cars for commodities that do not require protection of such equipment. It refused to accept private refrigerator cars from Stockley Brothers & Company for loading with can-

ned goods at its plant in Tennessee. The carrier takes the position that refrigerator cars are not necessary for such traffic during the summer and consistently refuses to furnish them. The carrier is in favor of the suspended rule.

The Delaware, Lackawanna & Western owns 878 refrigerator cars, of which 579 are old and 299 assigned to the banana service out of New York. During the last year the bunkers were removed from 150 of the 579 and these are now used only for transporting ice. The others are in general service. The railroad cars are used for the transportation of dairy products from Buffalo to New York and other eastern points, but there have been complaints by some of the shippers because the cars did not have brine tanks and did not afford sufficient refrigeration. The witness was unable to state whether the cars were or were not suitable for the transportation of dairy products. The Delaware, Lackawanna & Western, and the New York, Chicago & St. Louis Railroad jointly leased 299 brine-tank refrigerator cars from the North American Tank Car Corporation with the view of assigning them particularly to the movement of dairy products from western origins. The New York, Chicago & St. Louis has the exclusive control of the distribution of these cars and, so far as could be ascertained, there is no contract between the two carriers governing how they shall be routed. It was the witness's understanding, however, that the New York, Chicago & St. Louis routes eastbound shipments over the rails

of the Delaware, Lackawanna & Western so far as is practicable. Each carrier pays \$25 per month per car for the leased cars and the mileage earnings are equally divided among them.

The New York, Chicago & St. Louis owns 375 bunker-type refrigerator cars and, as before stated; jointly with the Delaware, Lackawanna & Western, leases 299 brine-tank refrigerator cars from the North American Car Corporation. The carrier also has a contract with the Fruit Growers Express to furnish refrigerator cars for the movement of grapes from stations in the western New York district during the period August 1 to December 31. It pays 2 cents per mile, and allows the latter the published refrigeration charges for the cars moved under ice, and \$2 per car if they move under ventilation. The Fruit Growers Express performs the icing service on the cars furnished by it. Very few private cars are loaded on respondent's line and there is not a material volume of nonperishable traffic loaded into refrigerator cars thereon. In a few instances, such cars are used for the transportation of canned goods during the summer months. When this demand first arose the carrier tried to induce the shipper to use box cars, but they insisted on the use of private cars, and the carrier has acquiesced under the impression that it would otherwise lose the traffic. The number of refrigerator cars owned and leased by the carrier is sufficient to take care of all traffic originating on its lines. The witness considers

the leased cars suitable for the transportation of dairy products.

The Grand Trunk Railway system owns all of the stock of the Chicago, New York and Boston Refrigerator Company, a corporation with which it has a contract to furnish cars for the transportation of butter, condensed milk, cheese, dressed poultry, eggs, and game. While the contract specifically mentions the articles named, the witness stated that the car line furnishes refrigerator cars for the transportation of all of its perishable traffic.

The railway is obligated by the contract to pay the car company "the current rate paid generally by other railroad companies operating from Chicago eastbound to New England and trunk-line territories to similar refrigerator car companies, whether such compensation is on a mileage or per diem basis," except that, under no circumstances, shall the rate exceed 0.75 cent per mile. The car company controls the distribution of the refrigerator cars at and west of Chicago. The railroad is also obligated to pay the car company for all traffic transported over its rails in cars owned, controlled, or operated by the car company, and for all refrigerator traffic "which may be consigned in the cars of the 'car company' although loaded in other refrigerator cars" a commission of 10 percent on all first, second, and third class traffic, and a 7.5-percent commission on all other traffic. The commissions are percentages of the remainder of the transportation charges, after deduction of switching, arbitraries,

lighterage, bridge tolls, terminal, and other charges paid by the railroad. By supplemental agreement dated April 1, 1913, the 10-percent commission was increased to 12.5 percent.

The car company maintains 10 offices and employs 40 men for the solicitation of dairy-products traffic for movement principally from western trunk-line territory over the lines of the Grand Trunk. The commissions referred to above are paid for that service.

The Chicago, New York and Boston Refrigerator Company, prior to June 20, 1932, received a so-called commission from the Lehigh Valley and the Delaware, Lackawanna & Western of 12.5 percent of the gross earnings on butter, eggs, game, dressed poultry, and cheese, and 10 per cent on condensed milk, on all shipments routed over their lines. On June 20, 1932, the carriers notified the car line that they would reduce the said amounts from 12.5 to 11 percent and from 10 to 9 percent.

The witnesses for the Grand Trunk and for the car line testified that the commissions were paid for the solicitation of traffic. It clearly appears, however, that the solicitation did not create any new business, but merely resulted in traffic being diverted from one route to that of another. The Grand Trunk connects with both carriers at Buffalo. The witnesses were unable to explain how the specific amounts of the commissions were arrived at, or how competitive traffic is divided between the contracting railroads. The Lehigh Valley and Delaware, Lacka-

wanna and Western also pay 2 cents per mile mileage while the maximum paid by the Grand Trunk is 0.75 cent per mile.

The Atchison, Topeka & Santa Fe owns sufficient number of refrigerator cars to take care of all perishable commodities originating on its lines, except that its supply of brine-tank cars is limited, and probably it would not have sufficient number of that type to meet requirements. During 1932, 1,943 carloads of dairy products moved in private cars, not including shipments made by packers. A sufficient number of suitable refrigerator cars, in good condition, owned by the railroad, was available for that movement. The carrier does not lease or assign refrigerator cars to shippers on its line, but when they obtain cars from other sources it accedes to the demand that it permit their use. In every instance, where a shipper has obtained private cars, the carrier has objected to their use and unsuccessfully tried to induce him to use railroad equipment. A large proportion of the dairy products originated by it is now moving in railroad cars without complaints from the shippers as to their refrigerating qualities or size.

The Denver & Rio Grande Western owns 180 standard-gage refrigerator cars, but they are largely restricted to local use. It has a contract with the American Refrigerator Transit Company to furnish suitable cars, in good condition, for the transportation of all commodities originating on its line. It transports from 18,000 to 22,000 cars of potatoes,

vegetables, fruits, canned goods, and dairy products a year. Dairy products constitute but a small portion of the total perishable traffic. The carrier has encountered but few demands for cars of specific sizes or types. The shippers on its line are satisfied with its refrigerator cars, which are of modern construction, and have raised no question as to their suitability. No private refrigerator cars are used on its line, except from origins in Utah.

Nye and Nisson, Incorporated, a shipper of eggs from Salt Lake City and Murray, Utah, uses private cars from those origins. It also ships eggs from California to New York. Under tariff restrictions, private cars are not accepted for the movement from California. Railroad owned or controlled refrigerator cars are used. There is a transit privilege which permits storage, grading, and other services at Murray, Utah, for which a transit charge of \$5.85 is provided by tariff. The shipper, however, in many instances, desires the eggs to move through with as little delay as possible at Salt Lake City and Murray. Consequently, it transfers eastbound eggs from railroad cars to private cars. When a private car is not available, the eggs move through from origin to destination in the car in which they were originally loaded, and there is no allegation that they are not safely transported. At the time of hearing there was no tariff authority for the transfer described and no charges are assessed for the stop or the extra switching services necessary to permit the transfer. The witness's explanation for permitting

this illegal practice was that it was an outgrowth of the transit privilege and the desire of the shipper to have the eggs go out in the same train in which they arrive. It would appear, however, that it was directly due to the desire of the shipper to obtain a profit from the use of private cars. Witness for the association testified that a recent check showed that, from August 1931 to and including June 1933, a total of 374 carloads of eggs which had left originating points in California in railroad owned or controlled cars were transferred at Salt Lake City, Ogden, and Murray to cars of private ownership, for movement to eastern destinations. Since the hearing a tariff permitting such transfer has been filed.

The Union Pacific and the Southern Pacific own the entire stock of Pacific Fruit Express Company which supplies them with refrigerator cars. The latter's contracts with the railroads require it to provide and maintain refrigerator cars in good and safe condition and repair, and to furnish an adequate supply of such cars to the carriers for the transportation of all perishable commodities. The car line is required to perform refrigerating and heating services with certain exceptions. The tariff charges for those services are collected by the railroads and paid to the car line. The railroads are obligated to pay 2 cents per loaded and empty car-mile for the use of refrigerator cars during the entire life of the contract, irrespective of whether any change is made in the tariff rate. For cars as-

# MICRO CARD

TRADE MARK 

22

39



65



11682

signed to company service such as hauling ice, a rental of \$30 per month is paid.

Pacific Fruit Express has sufficient refrigerator cars to meet all the demands of shippers on its contract lines and these cars are said to be suitable for all perishable commodities, including dairy products which not only move therein for short distances but from the Pacific to the Atlantic coast. The cars are satisfactory to the shippers. While the supply of cars is said to be ample and in excess of present demands it is no greater than is necessary to take care of a volume of traffic equal to that handled before the depression.

The Pacific Fruit Express does not lease or assign cars to private shippers on lines west of El Paso, Tex. The witness did not know whether it placed cars in the exclusive use of shippers east of that point.

The Erie owns 396 refrigerator cars. Seventy-five of them are confined to the banana traffic which moves from New York, principally to Buffalo. It leases 242 of them to the Union Refrigerator Transit Company for \$15 per car per month. The car company is required to maintain these cars. The others are used almost entirely for the hauling of ice. It has a contract with the Union Refrigerator Transit Company under which the latter undertakes to furnish, at 2 cents per mile, all refrigerator cars necessary for the movement of perishable traffic, except bananas originating on its line.

Perishable traffic originating on the Erie consists of seasonable vegetables and fruits, originating at small loading stations, and a small quantity of dairy products, originating at six or seven small stations near Marion, Ohio. The total volume is small. Most of the perishable traffic handled by it is received from connecting lines or switching lines at Chicago or is ex-lake traffic obtained at Buffalo. The Erie furnishes very few refrigerator cars for traffic originating at or received at Chicago. It is not the practice of the switching lines to call on it for cars. They use cars of other carriers or private cars. Shipments from Buffalo move, almost if not entirely, in cars belonging to the packers, or cars obtained under its contract with the Union Refrigerator Transit Company. Private cars are not used for other traffic originating on the Erie, nor are refrigerator cars used to any extent for the movement of nonperishable traffic.

The Pennsylvania owns stock in the Fruit Growers Express with which it has a contract requiring the car company to furnish it with sufficient suitable refrigerator cars for the reasonably prompt acceptance and transportation of all commodities requiring protection. Few private refrigerator cars are loaded on the Pennsylvania, except probably at Buffalo. The witness was not familiar with the conditions there, but stated that there is no doubt but that shippers are leasing or obtaining cars from private sources.

The Baltimore & Ohio also owns stock in the Fruit Growers Express, from which it obtains all its refrigerator equipment. Its contract is identical with that of the Pennsylvania. The witness estimated that, probably, only a few hundred private refrigerator cars per year are loaded on its line, and those principally with dairy products. He says that the perishable commodities, originated by it consist mostly of apples, which are seasonable. So far as the witness knew, no canned goods move in refrigerator cars from origins on this line.

It is the practice of the Baltimore & Ohio to waive the payment of demurrage when a car is on the tracks of the consignee and he placards it as belonging to him although the car, at the time it left the point of origin, and during its entire movement, may have been placarded as belonging to the consignor. No investigation is made to determine whether, as a matter of fact, the consignee has any interest in the car. The statement of the consignee or his act in placarding the car is treated as sufficient evidence of ownership.

The New York Central, through a subsidiary, owns all the stock of Merchants Dispatch Incorporated, to which it leases 11,131 refrigerator cars. It has a contract with the car line that requires the latter to furnish any additional refrigerator cars necessary to meet the needs of the carrier. Since 1929, there has been a varying, but appreciable, surplus of Merchants Dispatch cars on the rails of the New York Central. In 1930 the cars on the carrier's tracks, including surplus but excluding

those in shops, averaged 17 miles per day or 34 cents per car, but under the terms of the contract, the New York Central paid the Merchants Dispatch for 60 miles per day per car. Since that time the guaranteed mileage has been reduced from 60 to 50 miles. The witness stated that he is unable to estimate the extent to which the use of private cars has contributed to its leased cars standing idle.

Although the New York Central has a contract with the Merchants Dispatch requiring it to use only cars furnished by that company, it permits the use of private cars by shippers. It alleges that if it did not accept the private cars and place them for loading its competitors would. The cars leased by it are suitable for all traffic, including dairy products, originating on its lines. It moves dairy products from the Lakes in both private and railroad cars and says that it has received no complaints as to the condition of the cars furnished by the railroad or as to their suitability for the safe transportation of such products.

#### Other Car Lines

The Merchants Dispatch Incorporated, the stock of which is owned by the New York Central through a subsidiary, owns approximately 13,993 refrigerator cars. It has contracts with several carriers to supply them with such cars. It leases and assigns cars to private shippers. It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad-controlled car lines. Since the hearing, the car

company has filed copies of 34 of its leases, 17 being with shippers for *form* 1 to 90 cars each, totaling 198 cars, at monthly compensations ranging from \$38 to \$42.50 for brine-tank cars, and \$35 to \$60 for standard refrigerator cars. These cars bear the shippers' reporting marks, and the lessees receive all of the mileage earnings. The car line claims that most of its cars that are in the service of private shippers are leased for amounts that are remunerative. Yet it filed an exhibit for the purpose of showing the average cost of ownership of refrigerator cars operated by nine car lines as 2.49 cents per mile. At 2 cents per mile the lessees are receiving a profit over the amount paid the car company.

The car company also has a contract assigning 20 cars to the service of one shipper, 5 to another, and from 350 to 400 to another. The only compensation it receives for those cars is the mileage of 2 cents. The contract for the larger number states that the assignment is for the purpose of avoiding damage to "the general run" of equipment used in fruit and vegetable service. Practically all of the contracts provide for increasing the number of cars specified therein, so that it cannot be determined how many cars it now has in the exclusive service of shippers.

It filed copies of contracts with 14 railroads. They provide that the railroads shall make an annual monthly "forecast or estimate" of the perishable freight traffic that will originate on or beyond their lines for which it is likely Merchants Dispatch

refrigerator cars will be required. They also provide that the Merchants Dispatch will furnish, so far as its facilities will permit, or as near as it reasonably can, cars in sufficient number and cars that are suitable for the transportation of all commodities originating on the contracting railroads. The carriers are obligated to use Merchants Dispatch cars in preference to all others, as far as possible, for all perishable freight originating on their lines or connecting lines for which they furnish the refrigerator cars.

The contracts with the St. Louis-San Francisco, Tennessee Central, and the Akron, Canton & Youngstown provide for the payment of mileage only. The contract with the Bangor & Aroostook calls for the payment of mileage plus \$5 per car. The contracts with the Lewiston & Youngstown Frontier and Northern Indiana provide that the Merchants Dispatch shall perform all the icing services and receive therefor only the tariff charges and, as rental for the cars, \$1.50 per diem, subject to a minimum charge of one day's per diem. The Maine Central pays mileage and \$5 per car except on "cars applied on warm car merchandise schedules" during the period such schedules are operated. The contract with the Pittsburgh and Lake Erie provides that it may use refrigerator cars for non-perishable traffic when the facilities of the Merchants Dispatch permit. It pays a rental of \$1.20 per diem on refrigerator cars in freight service, and guarantees 60 miles per day per car on refrigerator cars in express service. The railroads clean

the cars. The Reading, Lehigh Valley, and Central of New Jersey perform the icing services, yet their contracts call for the payment of mileage, \$12.50 per car on cars moving under ice, and \$5 for each car not under ice, loaded on their lines, or given to their connections for loading and return to them. Cars owned by the carriers, or cars owned by other railroads destined to home lines loaded on the carriers' lines, are exempt from such charges. The latter part of 1932, or the early part of 1933, the so-called service or loading charges were reduced 50 percent. The contract with the Western Maryland provides that the Merchants Dispatch shall perform icing services. It also provides for the payment of mileage, and that Merchants Dispatch shall receive all tariff charges on cars moving under section 2 of the perishable protective tariff and that, on cars not moving under that section, charges equal to the cost of ice at the tariff rate plus \$7.50 per car shall be paid. The Merchants Dispatch is also to receive \$5 per car and the cost of ice delivered in bunkers on all cars originated on the lines of other carriers requiring icing on the Western Maryland. The contract with the Buffalo, Rochester and Pittsburgh provides for the payment of mileage, and that Merchants Dispatch is to perform the icing services, for which it is to receive all tariff charges on shipments moving under section 2 of the perishable protective tariff, \$12.50 plus cost of ice at \$4 per ton delivered in the bunkers on all cars moving under section 4 of the perishable protective tariff, and \$5 per car on all cars

furnished by the Merchants Dispatch moving without ice. It is also to receive \$7.50 per car and a sum equal to the tariff charges under section 2 of the perishable protective tariff on all cars with ice placed on top of the load in the body of the car; \$5 per car on cars originating on other lines requiring icing on the lines of the railroad, and \$5 per car, plus the delivered cost of the ice, on cars originating on the railroad but not furnished by the Merchants Dispatch. In practically all the contracts the mileage rate to be paid is specifically stated to be 2 cents per mile for refrigerator cars in freight service, and 2.5 cents per mile in express service. In one or more of the contracts the amount of mileage to be paid is specified as that provided for in the current tariffs.

The witness testified that the Merchants Dispatch has cars of only two sizes, 36-foot cars that measure about 28 feet 9 inches inside, and 40-foot cars that measure about 33 feet 2 or 3 inches inside. Attention was called to the statements of other witnesses that a 32-foot 9-inch or 10-inch car is necessary to prevent shifting of egg shipments. He stated that his cars are used satisfactorily by the shippers. Considerable dairy products originate on the New York Central and other lines served by the Merchants Dispatch, and its cars move these commodities without complaint, and the witness stated he has no doubt that they are perfectly suitable for such traffic.

The General American Tank Car Corporation and its subsidiaries, the Union Refrigerator Tran-

sit Company, Quaker City Refrigerator Line, and General American Transportation System are under contract to furnish refrigerator cars for the Chicago, Milwaukee, St. Paul & Pacific, the Chicago, Rock Island & Pacific, Chicago Great Western, Erie, Minneapolis, St. Paul & Sault Ste. Marie, the Minneapolis & St. Louis and Missouri-Kansas-Texas, and nine smaller roads connecting with one or more of those named. The contract railroads serve 21 States, reaching from the Pacific Northwest to the Atlantic, and from the Canadian border to the Gulf of Mexico. They have considerable trackage in the Middle West, which is the large producing territory for butter, eggs, poultry, cheese, and packing-house products. The car lines named own over 8,000 cars that were designed for handling dairy products, fruit, vegetables, and other perishables. About 612 of these cars are leased to, and 636 assigned to, the exclusive use of shippers of dairy products, and 3,886, which are suitable for such traffic, are under contract to the railroads. The others are in the service of meat packers.

The witness who heard the testimony given in this case declared that his company can furnish every shipper with the type of car which he stated was required for his business. It is now furnishing, through the railroads, to shippers of dairy products on its contract lines, large and small cars with brine tanks, basket bunkers, divided basket, and plain bunkers. The majority used are of the plain bunker type, practically all of which have an inside loading length of 32 feet 9.375 inches.

Some, for longer hauls, use cars 33 feet 2 to 4 inches in length. The bunker capacities vary from 8,000 to 10,000 pounds, with a few equipped for "stage icing" as low as 4,000 pounds. The witness stated that, up until four or five years ago, comparatively few cars were leased to shippers, and those that were leased were for special needs. The rentals bore a fair relation to the actual cost of ownership. In the past few years, however, there has been keen competition in the leasing of cars to shippers. Because of the extremely competitive conditions, the monthly charges for leased cars have steadily declined until, at the present time, they do not have any relation whatsoever to the cost of ownership. The explanation of the making of unprofitable leases is that it would be fatal for a car company having a railroad contract to let other car companies lease cars to shippers who had formerly used its cars, and thereby destroy the value of the railroad contract by taking the business of the shippers on whom the car company must depend for mileage revenues. The witness stated that, under such conditions, it is better, from a financial viewpoint, to accept a lease which will give the car owner something to apply on costs, rather than to have the car remain idle and yield nothing, while interest and depreciation are accruing.

Another factor tending to make leases unprofitable is that lessees lease only enough cars to take care of the cream of their business and then run those cars steadily for long distances, thus increasing maintenance expenses.

These car companies maintain that their ownership costs show that 2 cents per mile barely enables them to maintain a sufficient number of cars and keep them in proper condition only when the movements thereof are rapid and frequent. They contend that, if the private and railroad-controlled car lines are to continue to function effectively, they must have all the mileage earned by the cars owned by them. They take the position that the proper economical function of a car line is to furnish cars to railroads, acting either as their refrigerator-car supply department, or supplementing railroad-owned cars, and that, if their activities were confined to furnishing cars through the railroads only, they could give a specialized refrigerator service meeting all requirements of shippers as to condition and quantity of equipment. They say that present conditions are chaotic and prevent the orderly handling of refrigerator cars. They are in favor of the suspended rule becoming effective.

One witness appeared on behalf of the Fruit Growers Express, National Car Company, Western Fruit Express, and Burlington Refrigerator Express Company. These companies are separate and distinct corporations. The stock of the Fruit Growers Express is owned by several railroads, that of the National Car Company by the Fruit Growers Express, that of the Western Fruit Express by the Great Northern, and that of the Burlington Refrigerator Express by the Chicago, Burlington & Quincy. They are operated by one organization.

The accounts are kept separately but the cars of the several corporations are used in common. The Fruit Growers Express has contracts with some 57 or 58 railroads to furnish them with refrigerator cars. The Western Fruit Express operates only on the lines of the Great Northern and the Burlington Refrigerator Express only on the lines of the Chicago, Burlington & Quincy. Neither the Western Fruit Express nor the Fruit Growers Express lease, rent, or assign cars to private shippers. The Burlington Refrigerator Express leases cars to two or three shippers. The Fruit Growers Express did not desire to lease cars to shippers but, in order to meet the competition of the other car lines indulging in the practice on its contract lines, it organized the National Car Company, which leases and assigns cars to shippers, principally of dairy products. The cars operated by the latter company are mostly brine-tank cars and were obtained from the Fruit Growers Express.

The cars operated by the associated car lines are and have been used for a number of years for the transportation of a large quantity of dairy products and other perishables. They are operated in all sections of the country and transport the traffic in a safe and satisfactory manner. The refrigerating qualities, sizes, and condition of the cars are apparently satisfactory to a large majority of shippers, and the several car companies have a sufficient number of cars to meet all requirements of shippers on their contract lines.

The Fruit Growers Express performs the icing

services on most of the railroads with which it has contracts and other protective services on some of them. The compensation it receives therefor vary. It has different forms of contracts. The two principal kinds are those it designates as fruit-and-vegetable contracts and those represented by the one it has with the Pennsylvania Railroad. Under the first it receives 2 cents a mile and the tariff charges for icing. Under the second it is obligated to ice and/or salt or heat all cars furnished by it and all other refrigerator cars loaded with perishables while on the rails of the carrier. It also cleans and prepares the cars furnished by it. The railroad pays 2 cents a mile and the stated charges for refrigeration or protective service against cold and all charges for the use of refrigerator cars which are specified by the tariffs to be in addition to the freight charges to the extent such charges accrue to the railroad company. When refrigeration or protective service is paid for by shippers or when traffic moves under stated refrigeration charges accruing on other railroads, or where the icing or heater service at destination stop and hold points is paid for by shippers, the railroad pays the car line the tariff charges. If the cost to the car line, including items mentioned in the contract, exceed such tariff charges, the railroad reimburses the car line in the amount of such excess. It also pays 25 cents per car for each car inspected when no ice or heat is furnished, and \$2 for each loaded car handled in interterminal or intraterminal switching without a road haul.

The general manager of the Armour Car Line and assistant to vice president in charge of traffic of Armour and Company appeared on behalf of Armour and Company, Cudahy Packing Company, Kingan & Company, John Morrell & Company, Swift & Company, and Wilson & Company, packers of meats and dealers in packing-house and dairy products. Since the use of refrigerator cars first began, the packers named have undertaken to furnish all such equipment necessary to meet their entire requirements, the peak as well as normal movements. In 1920 they made representations to the American Railway Association that the mileage allowance then in effect was inadequate to enable those packers to earn sufficient to cover the cost of ownership, and that they could not continue to build and maintain a sufficient supply of refrigerator cars to meet their entire requirements unless an allowance of at least 2 cents per mile was granted. An agreement on that basis was reached and submitted to us for approval. Division 2, by reduced rate order no. 735, approved the 2-cent allowance for filing without formal hearing and with the proviso that such approval should not affect any subsequent proceeding. Those packers, because of commitments made by them at the informal consideration of the matter by the division, have felt obligated to us and carriers to maintain, by ownership, or lease, sufficient cars to transport all of their traffic. They feel that they have relieved the carriers from their legal obligation to furnish them with refrigerator equipment, and the carriers

have acted on that theory, for they do not hold themselves out to furnish refrigerator cars to those packers. Those packers' investment in refrigerator cars is about \$44,000,000. It is generally conceded that the railroads, private-car lines, and railroad-controlled car lines do not own sufficient cars of the proper type to safely transport fresh meat, and most of the railroad witnesses express doubt that the railroads and the car lines could furnish the cars necessary to transport the other products shipped by those packers.

A large proportion of the packers' traffic moves in mixed carloads consisting of meat and packing-house and dairy products. Brine-tank cars are required for the safe transportation of fresh meat. The facts and assertions, relative to the packers' businesses, hereinafter set forth, are based on the witness's knowledge of the affairs of Armour and Company. He was not sufficiently acquainted with the details of the other packers' businesses to enable him to speak authoritatively relative thereto, but stated that, from his general experience, he knows that his statements are not only true in regard to Armour and Company's affairs, but are generally true in regard to the other packers. The principal difference is that Armour and Company owns all the refrigerator cars used by it, while Swift & Company and John Morrell & Company, and possibly some of the others, lease cars.

All cars owned by Armour and Company have brine tanks and are built for general service, that is, for the transportation of all commodities which

that concern ships. They are used indiscriminately for the lading at hand, whether it be fresh meat, packing-house or dairy products, dressed poultry, or mixed carloads of those articles. Cars unloaded by it are loaded out again in many instances. That is done wherever possible. The loaded mileage exceeds the empty mileage on practically, if not on all, of the carriers in the country.

If it were necessary for Armour and Company to use its own cars for fresh meats, and mixed carloads containing fresh meat, and depend upon cars furnished by the railroads, assuming that they were able to meet the requirements, for the other products shipped by Armour and Company, it is reasonable to conclude that additional empty mileage would result, and that more switching would be necessary in the removal and placing of cars at its various packing plants, since Armour loads from 200 to 700 cars a day.

The witness has been engaged in the transportation of dairy products since April 1894. He testified that it was "news to him" that an even temperature or intense refrigeration was necessary for the safe transportation of eggs. Armour and Company provides less refrigeration for eggs than for its other traffic and, in winter, ships them without ice. Its cars vary in size. The maximum difference in their length is about 3 feet. Few of its cars will permit the loading of eight crates of eggs across the car. It starts the floor load against one side of the car and loads the crates compactly, leaving a space on the other side. The next tier is started

on the opposite side against the wall and loaded in the same manner. Each tier, therefore, leaves a space between the last crate loaded and the wall of the car on the opposite side from that left by the tier next above it. Nothing is put in those spaces. Usually the crates are loaded against the bunkers, leaving an empty space in the middle of the car which is filled by bracing or blocking. Sometimes the filler is placed next to the bunkers so that the crates meet in the middle of the car. Armour and Company has been loading eggs in that manner for years and shipping them for long distances, such as from Oklahoma to New York City, without damage. When so loaded the lading does not shift.

#### Tank Cars.

The carriers do not hold themselves out to furnish tank cars to shippers, and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material, although, in isolated instances, a few may be furnished to shippers.

The Union Tank Car Company owns about 35,000 tank cars, which are used almost exclusively for the movement of petroleum and its products. The cars are leased to shippers at rentals based on size and kind of car and the number of days they are under load. They are operated under the reporting marks of the car company which receives and retains all mileage earnings. The evidence is that an additional charge to the shipper is necessary because mileage earnings are insufficient to cover

cost of ownership. Most of the other evidence introduced at the hearing dealing with tank cars relates to special types such as chemical and milk cars. It also is to the effect that the cost to the shipper exceeds mileage earnings. Answers to the questionnaire show that tank cars are leased to the shippers for fixed amounts per month and that the shippers receive and retain all mileage earnings but they do not show whether the latter exceed the rentals. December 31, 1932, there were approximately 156,244 private tank cars in the United States. We have no evidence as to the large majority of them except such as is contained in the questionnaire. That is not comprehensive enough to warrant a conclusion as to whether abuses, such as we have discussed in connection with private refrigerator cars, attend the use of private tank cars. That such abuses, however, did exist is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice.

#### Stock Cars

The testimony relative to the use of stock cars is meager and indefinite. It indicates that carrier-owned stock cars are being displaced to some extent by private cars. Most of the stock-carrying roads have sufficient cars to meet the requirements of shippers located on their lines, except at large centers where stockyards are maintained. The witnesses were not sufficiently informed to give any

definite information as to whether the carriers could furnish sufficient stock cars to take care of the traffic originating at the latter points. The record leaves the question in doubt with an inference that they could not do so, especially if they were required to furnish cars to take care of the packers' traffic. Most of the large stockyards are served by switching or belt lines which do not ordinarily call on their line-haul connections to furnish stock cars, although they do so when necessary. The source from which the terminal lines procure the stock cars placed by them for loading could not be ascertained. The witnesses were under the impression that the terminal lines own and lease some cars and that a considerable number loaded by them are private cars furnished by the packers or other shippers. Whether the users of private stock cars derive a profit from the mileage earnings or receive some other monetary benefit from the car owners is not shown by the evidence.

#### Open-Top Cars

Data compiled by the car-service division of the American Railway Association shows that in May 1921 there were in service on the rails of all carriers, 6,609 gondolas, 17,944 hopper cars, and 647 coke cars, or a total of 25,200 open-top private cars. In May 1932 the numbers of the several types were reduced to 1,178 gondolas, 16,319 hoppers, and 134 coke cars, a total of 17,631. The majority of the hopper cars are coal cars. Prior to the hearing in *Assigned Cars for Bituminous Coal Mines*, 80 I.C.C. 520, private coal cars were given to the mine

to which they were assigned. The owner was entitled to the exclusive use of all that he controlled. The use thereof was not affected by distribution rules, except that they were counted against the distributive share of the mines. In order that they might have an ample supply of cars during periods of car shortage it was the practice of mine operators, public utilities, and large industries to own or lease cars. The findings in the case cited require that during periods of car shortage all cars be distributed to mines on a pro rata basis and that every mine on the same division or in the same district shall receive the same pro rata share of the total number of all available cars. They require that cars assigned or consigned to specific mines shall be counted and charged against the mines at which they are placed to the same extent they would be if they were unassigned cars. Those findings destroyed the principal motive for the use of private coal cars. The use of such cars is decreasing although, no doubt, private cars are displacing railroad-owned cars in some instances, for the testimony shows that the Pennsylvania Railroad at the time of hearing had 35,000 coal cars that were idle while about 10,000 private cars were in use on its rails. The Chesapeake & Ohio, on the other hand, stated that it could not furnish sufficient cars to transport the coal offered it without the use of private cars. Most of the railroads apparently do not consider that the use of private coal cars presents any serious difficulty on their lines.

A presentation was made on behalf of the Aluminum Company of America and the Alcoa Ore

Company, which use especially designed aluminum cars and hopper cars remodeled by sealing the hoppers and affixing spouts with tight valves and putting tops on the cars for the transportation of bauxite ore and concentrates. Their object was to retain the present allowance of 1.5 cents per mile and to have us make that allowance a permanent minimum. We are authorized by section 15 (13) to prescribe only a reasonable maximum allowance. It is optional with the carrier whether it pays any allowance.

#### Summary and Conclusions.

It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them, whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. Under modern conditions, refrigerator cars have become regular equipment.

A private-car owner, whether he be a shipper or not, has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without its consent. If the carriers have suitable cars and will furnish them on demand they may refuse to transport shipments in private cars. They are privileged to do so at any time they have, or will secure and furnish,

suitable equipment to carry the commodities they hold themselves out to transport. *Armour & Co. v. El Paso & S. W. Co.*, 52 I.C.C. 240, 246.

In *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199, 214, 215, the court said:

Whatever transportation service or facility the law requires the carrier to supply, they have the right to furnish. They can therefore use their own cars and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged.

The carriers, by the rule here under consideration, reserve the right to furnish exclusively all refrigerator cars ordered by shippers other than meat packers. One of the grounds on which we are asked to find the rule not justified is that the use of private cars helps to hold traffic to the rails. We have no authority to require carriers to accept cars furnished by shippers for that or any other purpose. Therefore, unless the proposed rule will result in violation of the act, it is our duty to find it justified.

The purpose and meaning of the rule is clear and, when considered in its entirety, should not lead to any serious misinterpretation or misunderstanding. In the interest of certainty, however, the second sentence of paragraph (b) should be changed to show clearly what is meant by the phrase "special types of refrigerator cars." It is also suggested that the words "car owner" be changed to "such private car lines", in the first sentence of paragraph (d), and that there be added there-

after the words, "except when such private car line is also the consignor or consignee." Likewise the words "car owners" in the second sentence should be changed to "such private car lines."

Protestants object to the rule on the ground that the exception under paragraph (c), which permits meat-packing companies to continue the use of private cars for the transportation of commodities named in item 1130, is unduly prejudicial and unjustly discriminatory. The record shows that dealers in dairy products are in direct competition with packers in the buying and selling of such products. The elimination of the exception in favor of meat-packing companies would remove any alleged undue preference in favor of such companies. The duty would then be upon respondents to furnish suitable cars to transport the products of such meat-packing companies. Since respondents do not have cars suitable to transport fresh meats and packing-house products, it will behoove them to make suitable arrangements to secure cars which will serve that purpose.

The circumstances and conditions surrounding and attending the use of private cars by the protesting shippers and packers differ in several particulars. The railroads hold themselves out to furnish suitable refrigerator cars to all shippers except meat packers. The protestant shippers do not undertake to furnish sufficient cars to take care of their entire traffic but lease, rent, or have on assignment, only such cars as they can keep moving regularly. These cars are used for ship-

ments which will produce the highest possible mileage, and the railroads must keep available and supply cars for the less profitable movements and to take care of the rest of the traffic. Floor racks are removed from private cars by shippers of canned goods and candy, thereby rendering them unfit for other perishable traffic. The cars are moved loaded, in some instances, in the direction of the heavy movement of empty refrigerator cars, for example, from Chicago to the Pacific coast, and must be returned empty because of the absence of the floor racks. None of the shipper protestants who presented testimony own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the published rates.

If the exception to the rule under consideration was limited to packers cars used in the transportation of fresh meats we might well find that it would not create undue prejudice or unjust discrimination. However, the exception in the rule applies to meat packers generally, and to all commodities handled by them, irrespective of the facts and circumstances surrounding and attending the use by them of private cars. The testimony, in justification of the exception to the rule, is confined to packers who have relieved the carriers from their obligation to furnish cars or, in other words, so far as can be ascertained from the record, to the six packers in whose behalf the joint presentation was made. Hormel & Company, the only other packer

presenting evidence, used railroad cars until about 12 years ago and still continues the use of some of them for commodities other than fresh meats. Most of its private cars are equipped with beef rails. There are a number of meat packers relative to whose business, and the facts attending their use of private cars, we have no information. Copies of contracts furnished by the Merchants' Despatch indicate that some of them lease cars from the same source and on the same terms and conditions as the dairy shippers. Whether they ship dairy products in competition with the latter is not shown, although it was stated on argument that most of the small packers do not ship eggs. Examples of such leases are those of Hormel & Company, for brine-tank cars at \$50 per month from the North American Car Corporation; and those made by the Merchants' Despatch to Jacob Dold Packing Company of New York for 50 brine-tank cars at \$40 per month with the privilege of increasing the number to 100 or reducing it to 25; to Jacob Baum Packing Company for 5 brine-tank cars, with the privilege of increasing the number to 20 at \$42 per month; to Columbus Packing Company of Ohio for 90 brine-tank cars with the privilege of increasing the number to 100, at \$48, per month; and to Western Packing Company for 6 brine-tank cars with the privilege of increasing the number to 15 at \$40 per month. The conclusion indicated is that condemnatory conditions such as we have described herein probably exist in connection with the use of private cars by some packers, as well

The testimony shows that under present conditions the carriers are not equipped to meet their legal obligation to furnish the packers with suitable cars, but this does not mean that they cannot make suitable arrangements for the use of cars to take care of the packers' needs.

Considering these premises we believe the application of an exception to the prohibition against the use of refrigerator cars should be conditioned on requirements that will remedy the present uneconomical, discriminatory, and unlawful practices herein elsewhere described.

That there have been grounds for complaint in the past as to the condition of refrigerator cars furnished by the railroads and because of their failure or inability promptly to supply refrigerator cars in sufficient numbers to take care of perishable traffic offered is not convincingly denied and is admitted by some of the respondents. The statements of protestants as to the present condition and suitability of refrigerator cars now furnished by the railroads and those as to their ability to meet all present demands were made without any real knowledge of the facts. The overwhelming preponderance of the evidence shows that the contrary is true, except as to the needs of certain packers. Cars furnished by the railroads are now being used satisfactorily for the transportation of all commodities shipped by protesting shippers. In some instances the private cars used by the shippers are identical with some of the cars owned by or contracted for by the railroads which would other-

wise furnish the cars. With a few minor exceptions, the private cars, the use of which the railroads seek to prohibit, are obtained from private and railroad-controlled car lines and, in many instances, from the car lines supplying the railroads on which the industries are located. Were such private cars withdrawn from the exclusive service of the shippers it is reasonable to believe that they would be placed in the service of the railroads if and as the demand warranted, either under present or additional contracts. There would be no decrease in the available supply of refrigerator cars.

It is conceded that if the railroads make the necessary effort when cars are ordered from them they can place cars promptly for loading, can see that they are clean, free from objectionable odors, and in good condition and otherwise render as efficient service as the shippers are now receiving by the use of private cars. That they will do so may confidently be expected, for, as the evidence shows, they will go to any legitimate extent to secure traffic. Competition is now too keen for them to treat reasonable demands of shippers with indifference.

We are not greatly impressed by the alleged advantages to the dairy-products, candy, and canned-goods industries in having cars of uniform size. It is doubtful, in view of the variation in the sizes of the packages loaded by each industry, and the heavy movement in mixed carloads, whether the savings in costs of loading and blocking or bracing is such

a material factor as the stress laid thereon by the protestants would indicate. Some of those who stress that factor most are using private cars, that are not uniform in size. The contention that the dimensions of refrigerator cars should be adjusted to meet the size of every commercial shipping package used for the numerous commodities transported is unsound and unreasonable. To hold that each and every industry and different parties in the same business, such as the dairy shippers, who insist on having cars that are 32 feet 8 or 10 inches long, and those who say that they require cars 33 feet 4 inches long, are entitled to demand that the cars be designed to permit the loading of their particular shipping packages without any unoccupied space, or in a personally preferred manner, would place an undue burden on the carriers.

An amended rule that will accomplish the purpose sought without undue prejudice or unjust discrimination is not only justified because of the exclusive right of the carriers to furnish cars, but also is advisable in the interest of economical operation and as a means of preventing unlawful rebates.

The use of private cars does not relieve the carriers of their obligation to furnish cars. They must be prepared at all times to accept any and all traffic offered to them by those now using private cars as well as by other shippers. The private cars supplant the railroad cars on regular lucrative hauls. Railroad cars are forced to stand idle while the carriers

are paying 2 cents a mile for the use of private refrigerator cars. The Chicago & North Western, one of the protestants, pays 2 cents per mile to users of private cars identical with displaced railroad cars leased by it for 1.5 cents per mile. Private cars, when held for loading, are stored on the tracks of the carriers and, when ordered placed, must usually be cut out from among other cars with resultant additional switching. Expedited return-empty movement is frequently insisted upon and, to a minor extent, the tracing of and passing reports on empties are requested and given. Private cars are moved empty from home plants to loading points even though railroad cars may be available at the loading points. As has already been noted, shipments of candy and canned goods move to the Pacific coast in private refrigerator cars when there is a large number of cars at all times at the points of origin moving empty to the coast. Shippers leasing or renting private refrigerator cars frequently insist that such cars be used for the transportation of commodities that do not require protection and, in some instances, that the cars be moved empty long distances for return with such lading.

The evidence is convincing that the general use of private refrigerator cars entails unnecessary expense to the carriers.

Section 15 (13) of the act provides:

If the owner of property transported under this Act, directly or indirectly, renders any

service connected with such transportation, or furnishes any instrumentality used therein, the charge or allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, \* \* \*

The paragraph as quoted contemplates that, if a carrier uses instrumentalities furnished by an owner of property transported, it may pay therefor. The only restriction on the payment to the shipper is that it shall be no more than is just and reasonable.

A car line, whether it be shipper or not, cannot be expected to build, maintain, and supply cars to the railroads unless it may reasonably expect to obtain a fair return on its investment. In fact, they could not obtain the necessary capital under any other conditions.

A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. *Interstate Commerce Commission v. Reichman*, 145

Fed. 235, the controversy involved our power to require a witness to answer a question relative to the payment of part of the car company's mileage earnings to shippers. The court said:

The purpose of the enactment of the statutes relating to interstate commerce was to give to all shippers of property uniform treatment in the matter of transportation and the Interstate Commerce Commission was created to secure the enforcement of those statutes. In the discharge of this duty, the Commission was authorized to procure information from any person whatsoever tending to show whether those laws are being obeyed. The question then presented is, would the payment, by the private car company, of a sum of money to a shipper who had previously paid the railway company the regular rate, place such shipper in a more favorable position respecting the question of transportation than that prescribed by the published tariff and occupied by shippers generally, and if so, has Congress prohibited those private car companies from making such payment, and, was the prohibition authorized by the Federal Constitution. Whether the person to whom the payment is made has, thereby, been removed from the level of equality to establish which the laws were passed, is too plain to justify extended consideration. With respect to the transportation of his property he is just as much better

off than the general run of shippers as the payment amounts to. The net cost of the transportation to him—for freight expenses—has been reduced just that much. It, therefore, being apparent that in such a case the purpose of the legislation has been defeated, the inquiry is, “Has this defeat resulted from a violation of a valid statute of the United States?”

The court then proceeded to a discussion as to whether the Act to Regulate Commerce was sufficiently broad to cover some of the abuses which it was enacted to cure. It said:

That law sought to establish a condition of absolute uniformity throughout the domain of interstate transportation to the end that no man having freight to ship would be charged more than anybody else would have to pay. That this law failed to accomplish the object of its enactment was due, primarily, to the fact that its prohibitions were aimed at and operated only on carriers. Its provisions did not extend to and embrace persons and corporations interested in, or concerned with the transportation business other than carriers, and their agents and shippers remained at full liberty to exact from railway companies transportation service at lower rates than were accorded patrons generally. If lower rates were given, the carrier only was guilty of an offense. The principal effect of the law seems to have been to require the resort to

round-about methods for the purpose of evading uniformity. The records of the proceedings of the courts and of the Interstate Commerce Commission during the years succeeding 1887 disclosed the employment of a large variety of means to evade the law. One of these was the use of the so-called private car; that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper, it being generally understood that in the case of the shipper whose traffic went forward in his own car excessive payments were made to him on the alleged score of mileage, which, in effect, brought his transportation cost below the regular rates, and in the case of the shipper whose goods were vehicles in cars belonging to a car company payments of money, as commissions or otherwise, were made to him by or through the medium of such private car companies; the effect of which was to give him the service at a cost below the regular tariff.

The court then proceeded to show that additional prohibitory legislation was regarded by the Congress as necessary which would extend to shippers and to persons and corporations beyond, or behind, the railway company, and this resulted in the enactment of the Elkins Act. The court concluded that that act prohibits the car company from giving to any shipper of property a favor or advantage not

publicly offered to all shippers by the published tariffs issued by the carrier.

In *Spencer Kellog & Sons v. United States*, 20 Fed. (2d) 459, the question was whether an elevator company was guilty of rebating that received from a carrier a published allowance of 1 cent a bushel for the service of elevation and paid half of it through grain brokers to a shipper when the freight rate included elevation. The Circuit Court of Appeals of the Second Circuit affirmed the conviction and said in part:

Congress did not intend to limit the offense described in it to cases of collusion between the carrier and the shipper. What was done by the plaintiff in error is not in dispute; therefore, the question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility.

The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said car lines. The shippers refused on

the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them. Consequently the extent to which the money paid to protestant shippers by the railroads or refunded to them by the car lines exceeded the cost of such cars to the shippers cannot be determined from the evidence. One shipper stated that he paid \$45 and \$50 per month per car for the cars leased by him and that the profits derived therefrom were approximately \$32.50 per car per month on about 200 cars, or approximately \$78,000 per year. Another originally used assigned cars but upon learning that others were making money by the use of private cars, entered into a contract under which it pays nothing to the lessor, but receives mileage earnings about a specified amount which averaged about \$18.75 per car per month in 1931 and \$21.27 per car month in 1932 on 150 cars.

While considerable stress was laid by shippers renting and leasing cars on the several factors hereinbefore set forth as reasons why they desire to continue the use of private cars, and while they refuse to admit that monetary profits were the principal reason, several stated that if they were deprived of such profits they would give their traffic to the trucks even though the railroads furnish cars identical with the private cars they are now using and the service was otherwise as good in

every particular. One witness, representing the associations heretofore named, objected to the establishment of reduced rates on dairy products to meet truck competition because of the effect such rates would have on prices at production points. He preferred that transportation costs be reduced by profits derived from the use of private cars. Presumably because the producers have no means of determining the amount of such reductions.

The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies under the contracts and remit the remainders to the shippers. The contract price is usually fixed sufficiently low so that the mileage earnings will exceed the cost to shippers. It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be, but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, if only sufficient cars to take care of assured needs are leased, profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment.

The rental contracts differ from the leases in that the shipper is not obligated to pay anything

for the use of the cars. He obtains the cars without cost to him. They are agreements between the shipper and the car company that the car company will pay over to the shipper part of the mileage earnings received from the railroad provided only that the mileage earnings exceed a stated amount. The amount invariably is fixed sufficiently low to assure the shipper of some monies from the car company.

It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated.

The car companies collect and retain all of the mileage earned by assigned cars, but a rebate may be effected by what is equivalent to cash just as successfully as when cash is paid. As we have seen, the painting of advertising matter on assigned cars is a thing of value. In fact one witness considered it such an important item in his company's nationwide scheme of advertising that he declared it would give its traffic to trucks if it were deprived of such advertising. Several others laid considerable stress on the value of the advertising. There can be no doubt that the beneficiaries thereof are receiving something of value that is not and cannot be given to all shippers.

The conclusion is inescapable that the demand for the use of private cars by shippers is because of the profit flowing to them by the use of such cars. If such profits were denied to them, as we think they must be, it is inconceivable to believe that shippers would continue to pay amounts ranging from \$30 to \$50 per car per month when they could demand that the carrier supply suitable cars without cost over and above the freight charges properly applicable to the shipments transported.

The carriers should give careful consideration to complying with their legal obligations to furnish suitable refrigerator cars of their own ownership or those with whom they have contractual relations for the transportation of perishable commodities which they hold themselves out to transport. This applies equally to the cars for the transportation of products of the meat packers. In the interest of efficiency and economy of operation and considering the seasonal needs of refrigerator cars a pooling of such cars under unified operation might well be considered.

The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars.

We find that the proposed amendment of rule 35 is justified but that the proposed section 1 of rule 36 is not justified, without prejudice to the filing of an amended rule conforming to the suggestions

herein. Such amended rule should not contain an exception in favor of meat-packing companies as now proposed. We further find that the use of private refrigerator cars by shippers results in uneconomical operation and unnecessary expense to the carrier; that a shipper who pays only the published rates and uses private cars displaying advertising matter receives something of value in addition to the transportation of his traffic not available to those using cars furnished by the railroads and that the practice should be prohibited; that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; and that any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by the railroads as mileage earnings in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions.

We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in

arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate.

Respondents will be expected to take the necessary action to remedy the conditions found uneconomical and unlawful herein.

An order will be entered requiring the cancellation of section 1 of rule 36 and discontinuing the investigation and suspension proceeding. No order will be entered in Ex parte no. 104, part V.

Commissioner Splawn did not participate in the consideration and disposition of this case.

### **.ORDER**

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2d day of July, A. D. 1934.

Investigation and Suspension Docket No. 3887

Use of Privately Owned Refrigerator Cars

It appearing, That by order dated May 23, 1933, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until January 1, 1934;

It further appearing: That the operation of said schedules has been voluntarily deferred by respondents until October 31, 1934;

And it further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel those schedules under suspension which are contained in section 1 of rule 36, as described in said report, on or before October 30, 1934, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act;

It is further ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, except as to the schedules mentioned in the next preceding paragraph hereof, be, and it is hereby, vacated and set aside as of July 25, 1934;

And it is further ordered, That this proceeding be discontinued.

By the Commission,

[Seal]

GEORGE B. McGINTY,

Secretary.

Thereupon

DAVID T. AYRES,

called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

Direct Examination.

By Mr. Williamson:

I am the freight car service agent for the Southern Pacific Company. In that capacity I am familiar with the tariffs and the use and operations of tank cars, and with the position of the Southern Pacific Railroad Company in regard to supplying tank cars. Referring particularly to the period from September, 1933 to and including August, 1935 the Southern Pacific Company did not own sufficient tank cars for general use or service suitable for use in the transportation of cocoanut oil from the San Francisco bay area to eastern points, nor was the Railroad obligated under the Consolidated Freight Classification Tariff No. 10 effective December 7th, 1935 and the tariff regulations which were practically the same and were in effect prior to that time. During that period we did not generally furnish tank cars for the use of edible oils. We but rarely allow our tank cars to go east of a certain point. I am familiar with the nature of the service of the El Dorado Oil Works. We do not hold ourselves out to supply cars for transportation of the type mentioned here.

(Testimony of David T. Ayres.)

Cross-Examination.

By Mr. Matthew:

The Southern Pacific Company owns some tank cars and has owned tank cars for a great many years past. Those tank cars are sometimes supplied to shippers for the loading of such liquid commodities as oil. They are sometimes furnished to shippers for the loading of cocoanut oil. We have very few facilities of that kind and to meet the requirements of the trade we have to call upon shippers to furnish their own cars. If they are small shipments we might handle them. We do not [46] attempt to meet the requirements of that particular trade. It would be an isolated case where we supply the cars. The company owns only approximately 50 tank cars of the kind used in the transportation of cocoanut oil. It is a matter of hundreds of tank cars, over and above those 50 cars, that are traveling over our lines during the season for the movement of the oil.

Redirect Examination.

By Mr. Williamson:

Roughly, the Southern Pacific Company owns 40 tank cars of 6,000 gallons' capacity; about 50 of 8,000 gallons' capacity; 73 of 10,000 gallons' capacity; and about 2,100 of 12,500 gallons' capacity. The tank cars which were used by the El Dorado Oil Works in the transportation of cocoanut oil were those having a capacity of 8,000 gallons. If we fur-

(Testimony of David T. Ayres.)

nish them they would have to move to eastern points and come back in a more or less continuous operation. Of course, being our cars, they would have to come back to our railroad.

Thereupon

PERCY H. EMERSON,

called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination.

By Mr. Williamson:

"I am transportation inspector of the Western Pacific Railroad Company, in charge of the movement of tank cars. I know the tank car situation of that company, what tank cars they have, and for what purposes they offer them to the public. The Western Pacific Railroad Company during the period September, 1933, through and including August, 1935 did not have tank cars for rental or for use by the public in the transportation of vegetable oils from Bay points to eastern points. We would look to the tariffs to which Mr. Ayers referred to find the freight rate to be paid on the movement of the commodities from the San Francisco Bay area to eastern points, and to determine the [47] amount that the railroad companies under which the haul was made, would pay to the supplier of the tank cars on each of such hauls, and there

(Testimony of Percy H. Emerson.)

were no other tariffs or rules or regulations applicable to those subjects.

### Cross Examination.

By Mr. Matthew:

All I meant by my answer was that certain freight tariffs are published by the carriers and are filed with the Interstate Commerce Commission, which includes certain freight rates and include among others rates governing the movements of cocoanut oil in tank cars from points in California to points in the Middle West and the East.

Thereupon

### JOHN A. CHRISTIE

called as a witness on behalf of the plaintiff being first duly sworn testified as follows:

### Direct Examination.

By Mr. Williamson:

I am Division Superintendent of the Atchison-Topeka and Santa Fe Railway Company. I have in charge the matter of transportation of tank cars and freight cars. I don't know whether the Santa Fe has ever furnished any tank cars during the period between September, 1923, and August, 1935, to the El Dorado Oil Works for the movement of cocoanut oil from the San Francisco Bay Area to eastern points. We have no tank cars assigned to

(Testimony of John A. Christie.)

the service of the El Dorado Oil Works or to the movement of cocoanut oil. I have no knowledge that any were ever so assigned. I do not recall that any were ever assigned to the Durkee Famous Foods Company, or the Best Foods Company, or the Philippine Refining Company. The Santa Fe has tank cars of that type available. We have all classes of tank cars. We do not have enough cars to handle the public demand.

Cross Examination.

By Mr. Matthew:

By assigned cars I meant that they were exclusively [48] set aside for the service of the shipper. The company owns a great many tank cars, I think 3400, that are used throughout the Santa Fe system, and from time to time are furnished to shippers for the transportation of liquid commodities when available.

Redirect Examination.

By Mr. Williamson:

These tank cars are used in the transportation of fuel oil. El Dorado Oil Works might have ordered a car at some time for the transportation of its cocoanut oil and we might have furnished the car. We don't furnish a car to the El Dorado Oil Works for the transportation of its cocoanut oil unless they order it, and I don't recall ever furnishing one. It is my understanding that the railroad companies do not hold themselves out as fur-

(Testimony of John A. Christie.)

nishing tank cars for the movement of vegetable oils.

Recross Examination.

By Mr. Matthew:

I mean that the tank cars of the Santa Fe were built for their own use exclusively for the transportation of fuel oil, but are sometimes switched into other service like gasoline and distillate. I don't recall using an oil car for the transportation of wine but it is possible. I think the tank cars of the Santa Fe are sometimes furnished to shippers and used for the transportation of vegetable oil. If we got an order for a load of cottonseed oil and had a car, we would place it for loading. This would be in the same way that we would furnish a car if we had it available for the transportation of cocoanut oil. If a shipper such as El Dorado Oil Works should ask us to supply a car for the transportation of cocoanut oil from Oakland or Berkeley to a point in the middle west or east reached by or through our road, and we had such car available, the El Dorado Oil Works would be regarded the same as any other company that had certain commodities to move from one point to another, and if we had the car [49] available we would furnish it. Not many of these tank cars of which I speak are equipped with coils. In the movement of cocoanut oil, the coil part is necessary.

Thereupon

**DOUGLASS M. BARROWS**

was called as a witness on behalf of the plaintiff and being first duly sworn testified as follows:

**\* Direct Examination.**

**By Mr. Williamson:**

I am the Assistant Secretary of the El Dorado Oil Works and the El Dorado Terminal Company and am in charge of their books, accounts and records. I am familiar with relations between these companies and the General American Tank Car Corporation and with the contract entered into between El Dorado Oil Works and the General American Tank Car Corporation of September 28th, 1933. I am familiar with the movement of all of the cars leased under that contract from the period from December 1st, 1934 to August, 1935. They were loaded with cocoanut oil, and most of them moved from the Berkeley plant of the El Dorado Oil Works or from the Terminal to Eastern points generally. I know that the El Dorado Oil Works did not pay the freight on these movements. In every case the consignee did. These cars leased by my Company from the General American Tank Car Corporation under this particular agreement are not the ordinary tank cars as generally understood. The main difference is in the fact that they have steam coils. Cocoanut oil is a solid at particular temperatures. It melts at 85 to 90 degrees and below that it is a white, solid substance. Consequently the

(Testimony of Douglass M. Barrows.)

cars in which it is carried must be equipped with steam coils, which lie horizontally in the bottom of the tank. The coils must be extremely clean. A little rust, discoloration or anything like that is apt to completely ruin or at least reduce the value of the oil in it because the oil is very [50] delicate. A very small amount of rust or discoloration will hurt it immensely. I don't recall ever making any effort to get tank cars for the purpose of moving our oil. We never had any dealings with any of the railroads moving this commodity with reference to the amount of freight bills that were paid.

“Mr. Williamson: Q. Has your company ever had any understanding or agreement with any railroad company with regard to its receiving directly or indirectly any refund or preference or discriminatory rates on commodities shipped?”

Mr. Matthew: That is objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid for it. I think it is entirely outside the issues in the case.

The Court: How do you believe that is within the scope of this case?

Mr. Williamson: I should perhaps limit it to the particular period here, September, 1933, to August, 1935. My purpose of the question is to divorce us entirely from any dealings with the railroads, whatever, in this matter.

Mr. Matthew: That is entirely immaterial, under decisions which I can cite to your Honor. Under

(Testimony of Douglass M. Barrows.)

the Elkins Act provisions against indirect concessions, rebates, and unfair advantages to the shipper do not only run against the carrier. They should not be a party to any plan whereby a shipper or consignee obtains an indirect rebate. It is not necessary the carrier itself shall in any respect concur in the arrangements whereby the concession may be obtained. I can cite your Honor cases to that effect.

Mr. Williamson: You do not contend that the El Dorado Oil Works has any agreement with any railroad carrier with reference to these so-called rebates, do you, Mr. Matthew? [51]

Mr. Matthew: Well, I make no such contention because it is not within the issues of the case. There is nothing in the complaint or answer that says anything about any understanding or arrangement between the El Dorado Oil Works and—

Mr. Williamson: It would be probably more in order for rebuttal, but in view of the fact you do not contend we have, as I understand your position and your pleadings,—then I won't insist upon this question.

Mr. Matthew: I am talking about the pleadings."

Then Mr. Barrows continued with his testimony as follows:

Payments were made by General American Tank Car Corporation to El Dorado Oil Works between September, 1933 and August, 1935 on vouchers purporting to cover mileage earnings in excess of rental, with the accompanying statements showing

(Testimony of Douglass M. Barrows.)

what the payments covered. After some time in the middle of the year 1934, no payments were made to El Dorado Terminal Company or Oil Works.

*A*Cross Examination.

By Mr. Matthews:

My company was credited thereafter with such proceeds of the mileage earnings as were equal to the rental or car hire reserved in the contract of September, 1933. We have actually paid nothing more by way of rental for car hire to the defendant since the summer of 1934. No money passed either way. Our shipments of cocoanut oil are made customarily pursuant to contracts which we have with Eastern purchasers. We make our contract for forward sales over a period of several months at definite prices in tank cars containing 60,000 pounds of cocoanut oil, price f. o. b. Berkeley, and they are shipped to order from there on. There is always a written contract covering each order that is taken. It has been our practice throughout the entire period to make quotations on [52] prices uniform f. o. b. Berkeley.

Thereupon the following portions of the deposition of

**MR. DONALD H. SMITH,**

a witness having been first duly sworn, who was called on behalf of the plaintiff, were offered and read by plaintiff:.

Direct Examination.

By Mr. Williamson:

I am Traffic Manager of the General American Tank Car Corporation, and as such I handle the tank cars of that corporation including tank cars that are under lease. My handling consists of the distribution and movement of the cars, keeping the records and computing the mileage, and primarily the functions of the Traffic Department. I recall having dealings with El Dorado Oil Works with respect to the use of tank cars as long as I can remember. The handling of tank cars referred to in the agreement of September 28, 1933 which has been handed me came within my function as traffic manager. Outside of the cars specifically provided for as under constant use under the terms of the lease any cars that were desired would ordinarily be ordered through Mr. Musser, Head of our Los Angeles office. He had certain cars on the Pacific Coast available for filling orders, but if he did not have sufficient cars he would call on us. I do not recall any instance of Mr. Musser asking us for other cars. I would say that we had probably 400 tank cars operating in California. These cars have

(Deposition of Mr. Donald H. Smith.)

operated over practically all of the lines from Chicago westward to the Coast. I am familiar with the rate set-ups of the various lines and with their rules and regulations with respect to the movement of cars. The tank cars are all handled under rules or regulations with respect to the handling or movement of tank cars such as those covered by this contract for use in the transportation of vegetable oils, which are contained in published tariffs approved by the Interstate Commerce [53] Commission. As far as I know, there are no rules or regulations governing the handling or movement of tank cars for the transportation of vegetable oils except those that are contained in the published tariffs approved by the Interstate Commerce Commission or the Railroad Commission. I do not know of any change in those tariffs limited to tank cars used in the transportation of vegetable oil since September 28th, 1933. I know of no contract between my company and the Western Pacific Railroad, Atchison-Topeka and Santa Fe, or the Southern Pacific Railroad for the movement of our tank cars in their several areas. We have no contracts with railroads with respect to the payment of mileage earned on cars, nor have we ever had during my time. The payment of mileage on the movement of tank cars is based on the published tariff approved by Interstate Commerce Commission, and all sums derived by my company as mileage earned on the movement of tank cars owned or operated by it are based on

(Deposition of Mr. Donald H. Smith.)

those tariffs. That matter is clearly within my personal knowledge, and is applicable to all of our relations with the Western Pacific, Southern Pacific and Atchison-Topeka and Santa Fe. All of the tank cars leased to the El Dorado Oil Works under the contract in question and all of the tank cars which we have from time to time rented to El Dorado are all owned by my company and are not owned by any railroad. No payments have ever been made by any railroad with respect to the use of these tank cars covered by our contract other than as provided or permitted by the published tariffs. The only considerations are those which have been paid to us. We have other contracts governing the movement or leasing of cars in the California area in addition to contracts with El Dorado Oil Works. We have probably 400 tank cars in general service in the California area. We have a yard in California, where repairs are made by us. We have tank cars on San Francisco [54] Bay to take care of shipments called for by El Dorado Oil Works or other people the Southern of the railroads in California furnish to shippers tank cars suitable to transportation of commodities similar to the commodities shipped by the El Dorado Oil Works. It is my understanding that Southern Pacific Company furnishes tank cars for transportation of coconut oil, although this is hearsay and I have had no actual experience in connection with it. I have made the settlements from time to time with the railroads with regard to payment of mileage paid to my com-

(Deposition of Mr. Donald H. Smith.)

pany for the account of cars referred to in the agreement with El Dorado Oil Works, dated September 28th, 1933.

The following additional portions of the testimony of Mr. Donald H. Smith were offered and read by defendant:

Dorwood & Sons, operating out of San Francisco, lease cars from us at the present time for the movement of cocoanut oil products. Durkee Famous Foods, operating in Berkeley, lease cars from us, and their plant at Portland has also leased cars from us. There are undoubtedly other corporations or concerns about San Francisco Bay to which we have leased tank cars as distinguished from refrigerator cars, although I cannot recall them.

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Thereupon the following portions of the deposition of

**THOMAS B. KIAS,**

a witness called on behalf of the plaintiff, having been first duly sworn, were offered and read by plaintiff:

Direct Examination.

By Mr. Williamson:

I am in charge of the billing department of the General American Tank Car Corporation. My employment covers the billing of tank car rentals and mileage and the billing for cars furnished under the

(Deposition of Thomas B. Kias.)

contract of September 28th, 1933. We bill the El Dorado Oil Works or Terminal Company for the monthly rental agreed upon on the number of cars covered by the contract and also for the number of cars temporarily [55] rented. Car service and car rental is the same thing. Under the contract, El Dorado is not responsible for repairs, and unless there is something unusual they are not billed for repairs. I prepared or there was prepared under my direction monthly statements and invoices similar to the carbon copies of some of which have been shown to me and previously mailed to the El Dorado Oil Works or Terminal Company during the period covered by the contract of September 28th, 1933. The statements were correct to my best knowledge.

Thereupon Mr. Matthew offered and read the following portions of the deposition of Mr. Kias, being his testimony on

*Cross Examination.*

By Mr. Smith, counsel for defendant:

During the effective period of the contract in question, that is to say from September, 1933, to the present time, we have given the plaintiff credit for mileage to the extent of rental charges which have accrued on the cars during such period. We have made no collections from the plaintiff and we claim no sums due from the plaintiff on account of the rental which has accrued on these cars during that

(Deposition of Thomas B. Kias.)

period. The statements that have been furnished by the defendant to the plaintiff and about which I was interrogated simply show the amount of rental that accrued on certain indicated cars for certain periods of time. None of the statements shows any allowance of mileage or any data as to mileage.

Thereupon Mr. Williamson offered and read the following portions of the deposition of Mr. Kias:

Redirect Examination.

By Mr. Williamson:

When I stated on cross-examination that in our adjustments or invoices of account with plaintiff or El Dorado Oil Works, we made no claim for agreed rentals, I meant that we made no claim for rental for any balance due from the El Dorado Oil Works or [56] the plaintiff; that there was and is no rental overdue; there is nothing due that has not been offset by mileage earnings. Service charges which are for the agreed monthly rental per car would normally be billed for the month in advance, and against that credit would be thereafter given for the amount collected and received by us as mileage. Since July, 1934, we have made a change in our accounting arrangements in so far as the crediting of mileage is concerned. Before that date, we remitted to the El Dorado Oil Works mileage received by us in excess of the contract rental sums but have

The following portions of the deposition of

**MR. ARTHUR A. SOLENKE**

a witness called on behalf of plaintiff having been first duly sworn, was offered and read by plaintiff:

**Direct Examination.**

By Mr. Williamson:

I am Assistant Comptroller of the General American Tank Car Corporation. In that capacity I received information of the accounts and transactions between my company and El Dorado Oil Works and El Dorado Terminal Company in connection with the rental of tank cars from other departments of my company and set it on the books. In so doing, I believe the figures to be correct and do not know of any incorrect figures so set up. I know that there have been contracts between the Companies, and to my knowledge the only transactions between the companies have been in respect to renting and leasing tank cars.

The first item on the first page of the ledger sheets, Plaintiff's Exhibit No. 1, is dated December 1, 1933. These ledger sheets are chronologically arranged from that date to the last date, which is December 1, 1935. The pages are divided into two parts with four columns in each part. The columns of the first part are designated as the date, items, folio and debits. The columns of the second part are headed by the date, [57] items, folio and credits. These pages reflect in the first part of the debit

(Deposition of Mr. Arthur A. Solenke.)

umns of the second part represent the credit items of the El Dorado Oil Works. In pencil at the top of the first column of "debits" is the figure of \$12,681.66 and the first figure on the credit side is \$18,954.26. Those figures represent totals transferred from previous pages that have been taken out of our current ledger on account of the fact that the items appearing on those ledger sheets have been wholly paid or accounted for, or, in other words, balanced out. There is a red line below and there are debit charges against the El Dorado Oil Works. The item "December car service, folio 11090, \$2,275" represented the car rental charge of my company against the El Dorado Oil Works for the month of December, 1933. The next item is "December 11, Voucher No. 8843" and then there is a debit item "\$3,997.60." The latter item represented the amount due the El Dorado Oil Works on that date which we paid to them by that voucher reference. The items to which you have called my attention above the red line indicate that I, after deducting the rental that accrued for that month, remitted by check \$3,997.60, to balance up the account at that time. There were similar vouchers from time to time. For instance, in the month of January there was another voucher item, \$3,569.96; in February, \$4,650.58; and in March, \$2,295.31. If vouchers are subsequently mentioned upon the ledger sheets they are explained in the same way that I have explained these last items. On June 13, 1934, we checked out the sum of \$1,028.46 to the El Dorado Oil Works.

(Deposition of Mr. Arthur A. Solenke.)

On August 21, 1934, we checked out the sum of \$65.52. There appear to be no other voucher items after that date. We have never paid to El Dorado Oil Works by check any item after that payment. To explain how we arrived at that item of \$65.52 [58] from these records: we issued that voucher in payment of the credit memorandum issued up to and including No. 3245, which totaled \$2,826.52, from which amount we deducted the bill rendered for car service in June, our No. 5785, amounting to \$11.00 and our bill rendered July 1st for July car service, our No. 6096, for \$1375., and our bill of August 1st covering August car service, our No. 7094, for \$1375., a total deduction of \$2,761.00 for car service, and we paid the net difference of \$65.52. The figure that we used, \$2,826.52, which was a credit on our books to El Dorado Oil Works, represents mileage earned and car service adjustments which were merely nominal. That mileage was therefore all earned in the month of June or prior, 1934. During the period covered by the contract it was the practice to send our vouchers to El Dorado Oil Works in settlement of the balances due from time to time. This occurred over a long period of years. The mileage earned on the cars during the period of the contract and out of which remittances were made to El Dorado Oil Works was intended by me to mean the mileage earned under the existing railroad tariffs at all of those times. The account closing on the third page of our ledger sheets shows in

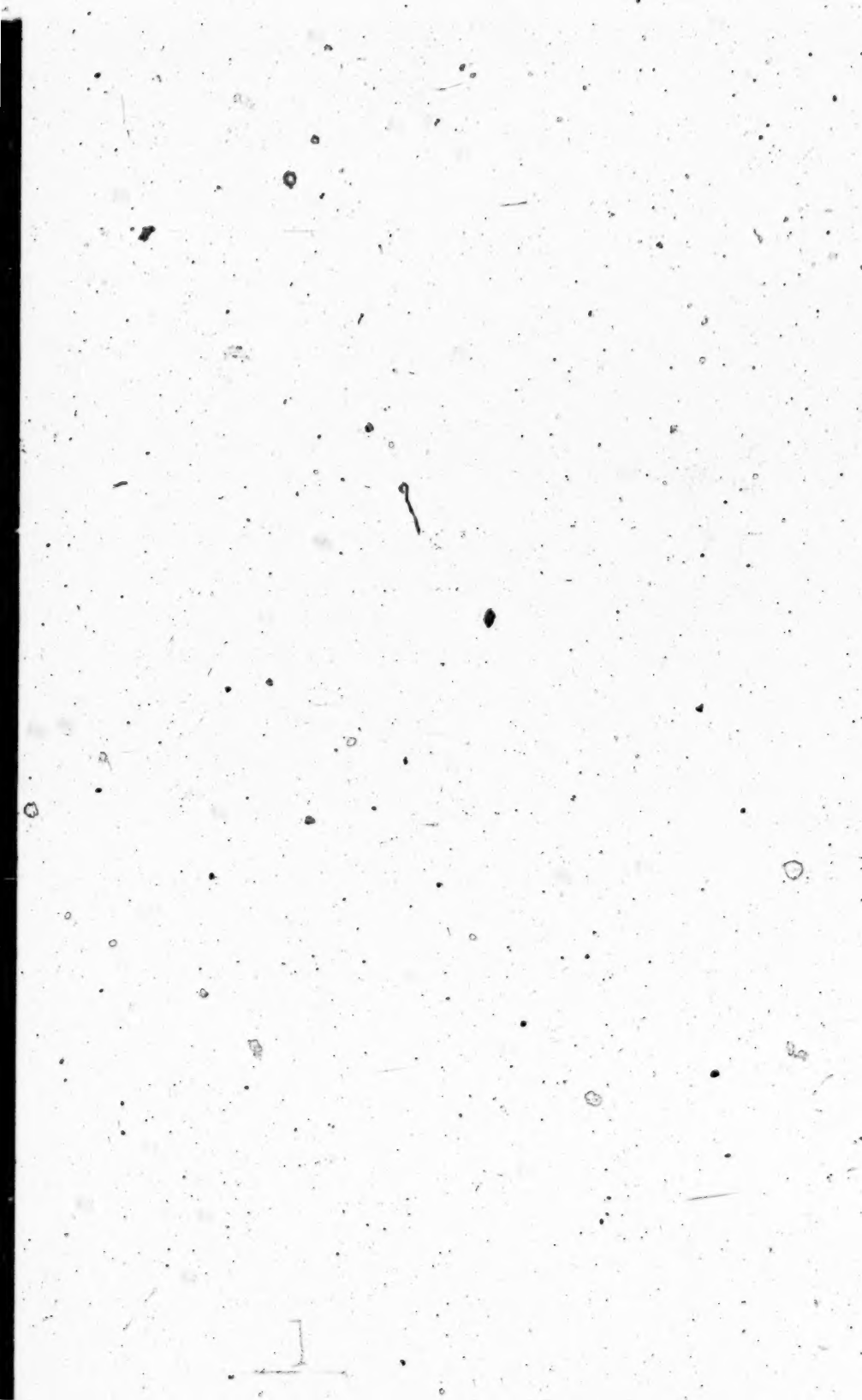
(Deposition of Mr. Arthur A. Solenke.)

pencil on the credit side \$17,759.88. That is not in my handwriting. The item refers to the total of the items appearing on the credit side of that account during the months of November and December, 1934, and January, February, March, April and May, 1935, including the item of \$5,724.53 brought forward from a previous page, and which in turn represented the credit item for the El Dorado Oil Works as of October 31, 1934.

Mr. Williamson thereupon introduced into the evidence photostatic copies of the five ledger sheets detached from the deposition of Mr. Solenke. The photostatic copies were received by the court and marked

**PLAINTIFF'S EXHIBIT No. 1.**

The photostatic copies of said Exhibit are as follows: [59]



		ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
1934	Nov	Nov Car Service	10088		137500	Nov 70	Aug. Apr. Mileage	2024		172753
	31		10462		15000	25	Oct	2222		2715
						30	Apr. Oct Car Service	2273		264598
							1239.45			621
										841317
	Dec	Dec Car Service	11089		137500	Dec 25	Nov Mileage	2190		151879
	31		10462		15000	31	Oct Car Service	2743		177
					161742		123261			692442
1935	Jan	Jan Car Service	1100		137500	Jan 75	Dec/Jan Mileage	228		152323
	31		450		12677		123647			1144766
					161015					
	Feb	Feb Car Service	1100		137500	Feb 28	Jan Mileage	711		150177
	28		1634		14286		113038			1294913
					175055					
	Mar	Mar Car Service	2096		137500	Mar 25	Feb Mileage	1210		156786
					1213605	31	Jan Feb Car Service	1302		491
										153220
	Apr	Apr Car Service	2095		137500	Apr 25	Mar Mileage	1694		137099
	15	Mar	2395		27000	25		1761		27090
	30		2395		3000	30		1812		3000
	30	Feb Apr	3668		17314					1619229
					1078279					
	May	May Car Service	4103		137500	May 25	Feb Apr Mileage	2240		154814
	31	Apr May	4691		29623	31	Jan Feb Car Service	2307		1965
					1665317		114646			127611

FILE

1991	ITEMS	DEBIT	DATE	ITEMS	CREDIT
May 1	May car service 4125	137500			61480
10	Do 4436	250739			
May 2	Apr May car service 4406	19000	May 16	Apr car service 4059	183
			21	May	11000
			25	Apr Mileage 2282	248163
					259346
				246.76	
June 1	June car service 5108	137500			
13	Do 5264	102846			
June 8	June car service 5165	1100	June 20	Jul Mileage 2540	2929
			25	May	2320
			30	June	253
			30	June car service 2898	2200
				131840	132740
July 1	July car service 4096	137500	July 20	June July Mileage 3042	1471
		13900	30	June car service 3202	275
			25	July Mileage 3245	1474100
			30	June July car service 3447	238
				1445.95	213190
Aug 1	Aug car service 5094	137500	Aug 25	June July Mileage 271	41259
7	Do 8244	6552		417.97	31119
		212652			
Aug 1	Apr car service 4196	137500	Sept 1	July car service 4006	2927
		52152	10	June July	1760
			25	Aug Mileage 4215	43780
			30	June July Aug	3248
					311114
Oct 1	Oct car service 4096	137500	Oct 25	Sept Mileage 4807	194177
31		6240	31	Apr car service 4828	82
		563442		75.11	370452

DATE	ITEMS	DEBITS	DATE	ITEMS	CREDITS
12/31	Ala. Car Service 1090	27500			
	170 8103	399760			
			Dec 10	Ala. Car Service	5670
			11	Ala. "	5671
			21	Ala. " "	5736
			25	Ala. Mileage	5761
					550460
12/31	Jan Car Service 113	11350			
	17 00 445	356946			
			Jan 20	Jan Car Service	257
			20	Ala. Mileage	257
			20	Ala. Car Service	241
					133586
Feb	Feb Car Service 111	111500			
	11 00 1245	465156			
	28 Ala. Car Service	16636	Feb 16	Ala. Car Service	560
			25	Jan. Mileage	143
			21	Feb. Car Service	742
					11143
Feb	Feb Car Service 210	210500			
	16 00 2345	224531			
Feb	Feb Car Service 250	15000	Feb 15	Jan Mileage	1032
			16	Jan. Mileage	1033
			25	Feb. "	1032
					33660
Apr	Apr Car Service 319	15100			
	10 00 1175	184114			
	20 Apr Car Service 337	13750	Apr 15	Apr Car Service	1702
			25	Ala. Mileage	1761
					216750

# MICRO CARD

TRADE MARK



22

39



1169

65



1935		ITEMS	FOLIO	✓	DEBITS	DATE	ITEMS	FOLIO	✓	CREDITS
June	1	June car Service	5444		16552	June 25	May Mileage	2711		16552
	30	"	5453		13750	30	May car Service	2740		165178
	30	Aug 1st June 4th Mileage	5548		9500					2710
					1336					17435
					1101					
July	1	July car Service	6108		137500	July 25	Apr May June Mileage	3283		138290
	31	June	6568		2547	31	May June car Service	3290		5133
						31	June	3291		642
Aug	1	Aug car Service	7103		137500	Aug 30	June July car Service	3702		2573
	15	Apr May	7232		3490	30	"	3703		2061
	26	July	7431		11089	30	July	3704		2129
					4003	30	July	3705		2129
						30	June July	3706		2933
						30	June	3707		183
						25	Apr to July Mileage	3724		137782
						31	July	3710		8245
Sept	1	Sept car Service	8000		13750					406576
	30	"	8450		2200					
					4398					
						Sept 25	July car Service	4436		887
						25	Aug Mileage	4215		127736
						30	Aug Sept car Service	4284		3016
						30	July Aug	4336		471
										434126
Oct	1	Oct car Service	9045		137500					
	18	Aug Sept car Service	9315		28355					
	31	Oct	9821		1065					
					20644					
						Oct 25	Sept Mileage	4677		135176
						25	Aug car Service	4648		266
										431478
Nov	1	Nov car Service	10048		137500					
						Nov 25	Oct Nov car Service	5202		358
						25	Aug Sept Mileage	5298		166654

A 3121  
BAGGAGE S.A.

1935

ITEMS

POLIO

DEBITS

DATE

ITEMS

POLIO

CREDITS

the

the car June

11105

137500

FILE



(Deposition of Mr. Arthur A. Solenke.)

The following additional portions of the testimony of Mr. Solenke, a witness called by the plaintiff, were offered and read by the defendant:

*Cross Examination.*

By Mr. Smith, Counsel for the Defendant:

The credit items on the mileage sheets that I have been testifying about are submitted to the Accounting Department by the Traffic Department. I do not know whether or not they are correct. I do not know whether the Traffic Department obtains those figures and a check is made by it of the car movements or whether it in turn gets the figures from someone else. I do not know what the source of the figures is. I simply know that they are turned over to me by the Traffic Department and I enter them on this ledger. The figures entered here are the figures they actually gave me, and whether the figures they actually gave me are correct I do not know.

The following additional portion of the testimony of Witness Solenke was read by Mr. Williamson:

*Redirect Examination.*

By Mr. Williamson:

I sent out checks to people in accordance with those figures. I do not know of any incorrect figures shown on any of those ledger sheets.

(Deposition of Mr. Arthur A. Solenke.)

Mr. Williamson thereupon introduced into evidence the assignment from the El Dorado Oil Works to the El Dorado Terminal Company of the claim which it is alleged in the complaint was assigned in the amount of \$1550.00 and which is part of the amount claimed in this action. The assignment was received by the court and marked

### PLAINTIFF'S EXHIBIT 2.

The assignment reads as follows:

#### ASSIGNMENT OF CLAIM.

For Value Received, the undersigned El Dorado Oil Works, hereby transfers and assigns unto the El Dorado Terminal [61] Company all that certain claim against General American Tank Car Corporation, which claim amounts to Fifteen Hundred Fifty and 16/100 Dollars (\$1550.16); also all claims and demands against said General American Tank Car Corporation arising out of a contract made and entered into September 28, 1933 between General American Tank Car Corporation and El Dorado Oil Works, in respect of mileage payments collected and received between January 1, 1934 and October 31, 1934 by General American Tank Car Corporation for account of tank cars leased.

Dated: San Francisco, May 1, 1935.

EL DORADO OIL WORKS,

By W. F. WILLIAMSON

Vice President

(Deposition of Mr. Arthur A. Solenke.)

Mr. Williamson thereupon introduced into evidence a paper setting forth certain tariff items. The paper was received by the court by stipulation of counsel and marked plaintiff's exhibit No. 3. It was stipulated by counsel in open court that particular published tariff items were as set forth in the exhibit and were in effect in the manner and during the period therein indicated. It was stipulated by counsel in open court that the last two pages of the exhibit, namely, pages 7 and 8, were not in effect during the period covered by this suit. It was further stipulated by counsel that the item in effect from September 28th, 1933, until May 15th, 1934 corresponds to and was verbatim as item No. 70, Rule No. 1 as set forth in said exhibit.

Such

**PLAINTIFF'S EXHIBIT No. 3**

reads as follows:

**EL DORADO TERMINAL COMPANY V.  
GENERAL AMERICAN TANK CAR  
CORPORATION**

Memorandum containing copies of Mileage Payment Rules on tank cars from May 15, 1934 to date, as published in Tariffs of the American Railway Association. [62]

## (Deposition of Mr. Arthur A. Solenke.)

All items reproduced below are or were published in Mileage Tariffs of the American Railway Association Tariff Bureau, B. F. Jones, Agent.

The rules reproduced below are all headed by a notation reading as follows:

(Applies only on tank cars of private ownership)

Item No. 70, Rule 1.

Effective May 15, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692.

Item No.	Rule No.
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# RULES

## PAYMENT OF MILEAGE

70

(a) Mileage for the use of cars of private ownership will be paid to the car owner or to the party who has acquired the car or cars, as shown by the permanent reporting marks (see Note) for loaded and empty movement, provided cars are properly equipped and marked with the name of the owner or lessee and proper reporting marks or initials and car number.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

(page 1)

Note.—Acquirement or ownership will be identified by the permanent reporting marks painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership. To avoid confusion incidental to similarity of initials, car owners should obtain assigned reporting marks from the Transportation Division of the American Railway Association.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 70-A (Cancels 70), Rule No. 1.

Effective October 1, 1934.

Mileage Tariff No. 7-1, I. C. C. No. 2692, Supplement No. 1.

Item No.	Rule No.
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RULES

PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks. (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

\*Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American

(10) Effective October 1, 1934.

(page 2)

Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

†Increase.

\*Denotes changes in wording which result in neither increases nor reductions.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 70-B (Cancels 70 and 70-A), Rule No. 1.

Effective October 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 2.

Item No.	Rule No.
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## RULES

## PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(10)  
70-B  
Cancels 1  
70  
and  
70-A

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

Note. Acquisition or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding

## (Deposition of Mr. Arthur A. Solenke.)

of cars will not be recognized as evidencing their acquirement or ownership.

†Increase.

(10) Effective October 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139062 of September 26, 1934.

(page 3)

Item No. 70-C. (Cancels 70-B), Rule No. 1.

Effective November 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 3.

[65]

Item Rule  
No. No.

RULES

PAYMENT OF MILEAGE

†(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities, lengths, cubical capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R, E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(3)  
70-C  
Cancels 1  
70-B

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented

## (Deposition of Mr. Arthur A. Solenke.)

outright by a railroad company until the cars have been re-marked with the name and the proper reporting marks of the lessee railroad company.

†Note.—Ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their ownership.

†Denotes changes in wording which result in neither increases nor reductions.

(3) Effective November 1, 1934.

(page 4)

Item No. 70-D, (Cancels 70-C and 70-B), Rule No. 1.

Effective November 1, 1934.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 5.

[66]

Item Rule  
No. No.

RULES

PAYMENT OF MILEAGE

- (a) Mileage for the use of cars of private ownership will be paid for loaded and empty movement to the car owner or to the party who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks (see Note), and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Circular 6-V, I. C. C. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for
- (4)  
70-D  
Cancels  
70-C  
and  
70-B
- 1

## (Deposition of Mr. Arthur A. Solenka.)

handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Circular No. 6-V, I. C. C. No. A-2297, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(b) Mileage will be paid to the car owner by other than the lessee on cars leased to or rented outright by a railroad company until the cars have been remarked with the name and the proper reporting marks of the lessee railroad company.

Note.—Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car. Car owners must obtain such reporting marks from the Transportation Division of the American Railway Association. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized as evidencing their acquirement or ownership.

(4) Effective November 1, 1934. Issued on one day's notice under special permission of the Interstate Commerce Commission No. 139872 of October 29, 1934.

(page 5)

Item No. 70-E (Cancels 70-D), Rule No. 1.

Effective April 1, 1935.

Mileage Tariff No. 7-I, I. C. C. No. 2692, Supplement No. 7.

[67]

Item No.	Rule No.
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RULES

### PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and

## (Deposition of Mr. Arthur A. Solenke.)

marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

150-E  
Cancels 1  
70-D

(b) Reporting marks will be assigned to car owners, only, by the Secretary, Transportation Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

†Denotes changes in wording which result in neither increases nor reductions.

(Deposition of Mr. Arthur A. Solenke.)

Item No. 100, Rule No. 1.

Effective August 29, 1935.

Mileage Tariff No. 7-J, I. C. C. No. 2791.

[68]

Item No.	Rule No.
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## RULES

## PAYMENT OF MILEAGE

(a) Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities, and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

100

1

(b) Reporting marks will be assigned to car owners only, by the Secretary, Transportation Division, Association of American Railroads, upon written application. Such marks may be used, also, on cars operated but not owned by the party to whom the marks are assigned, and, when so used, such cars, and the name and address of the owner, to whom the mileage will be paid, must be shown by the assignee in his registration in the Official Railway Equipment Register, I. C. C.—R. E. R. No. 241, issued by

(Deposition of Mr. Arthur A. Solenke.)

G. P. Conard, Agent, supplements thereto or reissues thereof.

(c) Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding or boarding of cars will not be recognized.

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(page 7)

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Item No. 100-A (Cancels 100), Rule No. 1.

Effective January 15, 1936.

Mileage Tariff No. 7-J, I. C. C. No. 2791.

[69]

Item No.	Rule No.
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RULES

#### PAYMENT OF MILEAGE

(a). Mileage for the use of cars of private ownership will be paid for loaded and empty movements only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number and provided, further, that the marked capacities and assigned reporting marks are properly published in the Official Railway Equipment Register I. C. C.—R. E. R. No. 241, issued by G. P. Conard, Agent, and the gallonage capacities in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof, except that the gallonage capacities of cars, designed and used exclusively for handling of commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars, need not be published in Freight Tariff 300, I. C. C. No. A-2518, issued by L. E. Kipp, Agent, supplements thereto or reissues thereof.

(Deposition of Mr. Arthur A. Solenke.)

(50) (b) Reporting marks will be assigned to car  
100-A owners only, by the Secretary, Transportation  
Cancels 1 Division, Association of American Railroads,  
100 upon written application. Such marks may be  
used, also, on cars operated but not owned by  
the party to whom the marks are assigned, and,  
when so used, such cars and the name and ad-  
dress of the owner, to whom the mileage will  
be paid, must be shown by the assignee in his  
registration in the Official Railway Equipment  
Register, I. C. C.—R. E. R. No. 241, issued by  
G. P. Conard, Agent, supplements thereto or  
reissues thereof.

(c) Assigned reporting marks must be painted  
or stenciled on the body of the car. When re-  
porting mileage allowances, the carding, placard-  
ing or boarding of cars will not be recognized.

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(50) Effective January 10, 1936, Issued un-  
der authority of the Railroad Commission of the  
State of California, No. 63-11739 of October 7,  
1935."

(page 8)

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It was further stipulated between counsel that  
the Transcontinental Freight Bureau, Eastbound  
Tariff No. 3-G, Item No. 404, Section 1 effective  
October 1st, 1933 reads as follows:

"Rates provided for freight in tank cars  
do not obligate the carriers to furnish tank  
cars." [70]

and it was further stipulated that all succeeding  
freight tariffs and their supplements in effect from  
September 28th, 1933 until the commencement of  
this suit in June, 1935 contained a provision reading  
exactly the same.

**MR. DOUGLASS M. BARROWS**

was then recalled by Mr. Matthew for further cross-examination and testified as follows:

**Cross Examination**

By Mr. Matthew:

In connection with my prior testimony that in practically all instances the freight charges on shipments of cocoanut oil from the plant of the El Dorado Oil Works to destinations out of the state were paid by the consignee, I state that prior to the date of the assignment of this contract the El Dorado Oil Works appeared as the consignor on the bills of lading and that since then El Dorado Terminal Company has appeared as the consignor upon the bills of lading. The larger number of the shipments were under order/notify bills of lading, and not straight bills of lading. When the shipments were made under order/notify bills of lading they were to the order of either El Dorado Oil Works or El Dorado Terminal Company, notify the consignee. In other words, prior to the assignment the El Dorado Oil Works was the consignor and the shipments were billed to the El Dorado Oil Works, notify/some designated party. After the assignment the El Dorado Terminal Company appeared as the consignor and likewise consignee, with the instruction 'notify' some third party. Those bills of lading were customarily forwarded with a sight draft attached to some bank in the city of destination, and in due course the notified party would appear at the bank and pay the sight

(Testimony of Mr. Douglass M. Barrows.)

draft and receive the bill of lading. When I said that the freight charges were ordinarily paid by the consignee I meant this party designated as a notify/party in the bill of lading for whom the shipment was intended. [71]

Thereupon and at the close of the trial but before oral argument by counsel, Mr. Williamson stated as follows: 'I am going to ask your Honor for findings on certain questions in this case, which are typewritten, and which are served upon opposing counsel. I would like to file these with the clerk as request to have findings made on those points.'

The Court: Special findings?

Mr. Williamson: Special findings.

Such findings read as follows:

"[Title of District Court and Cause.]

### PROPOSED FINDINGS

Plaintiff requests of the Court findings to the following effect:

1. That plaintiff is entitled to judgment against defendant in the sum of \$18,532.78, being the sum admitted by defendant and accepted by plaintiff as correct, together with interest thereon at 7% annually from the dates when due, and with plaintiff's costs herein.

2. That there was no prohibition in the so-called Elkins Act, either at the date of the execution of the contract in question, or at any time up to the date of trial, applicable to the payment of mileage

earned by tank cars used as said tank cars were used by the El Dorado Oil Works or the El Dorado Terminal Company under the terms of the contract with defendant [72] General American Tank Car Corporation.

3. That there was nothing in the railroad tariffs or in any regulation of the railroads or otherwise, prohibiting payment of mileage earned by the lessee of tank cars prior to August 29, 1935.

4. That the freight on all of the cars leased by the El Dorado Oil Works and for plaintiff from the defendant General American Tank Car Corporation under the said agreement of September 28, 1933, was paid in the amounts and at the time and in all respects as required by the applicable railroad tariffs.

5. That all said freight money was paid by the consignee of the goods shipped by El Dorado Oil Works and/or El Dorado Terminal Company, and that none of said consignees was a party to the said contract between the El Dorado Oil Works and General American Tank Car Corporation or party to any contract whatsoever in respect of the rental or use of said tank cars.

6. That neither at the time that said contract between the El Dorado Oil Works and General American Tank Car Corporation was made; nor at the time that the said contract was to take effect, to-wit January 1, 1934; nor at any time during the period covered by plaintiff's claims against General American Tank Car Corporation was there any rule, regulation or order of the Interstate

Commerce Commission prohibiting the making or carrying out of such contract, or the payment or credit by the General American Tank Car Corporation to its lessee of mileage earned, as provided in said contract.

7. That at the time the contract involved herein was made, on September 28, 1933, and at all times since, the railroads serving the San Francisco Bay Area have never held themselves out or been obligated by published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for [73] shipping cocoanut oil from shippers in the Bay Area to consignees in the areas to which the El Dorado Oil Works oil was shipped.

8. That said railroads, during the above mentioned period, have been unable and have not had the equipment or facilities to meet even a small part of the tank car requirements of shippers of cocoanut oil from the Bay Area.

9. That General American Tank Car Corporation during said period had no relation with said railroads as to tank cars leased under said contract except as to checking the movement of said tank cars and receiving mileage earnings according to the published tariffs.

10. That neither the contract in question, nor the agreement to credit and pay over certain mileage earnings by General American Tank Car Corporation, nor the credit or payment over of such earnings was or is illegal, or in violation of

or prohibited by the so-called Elkins Act or any regulation or order made thereunder.

Respectfully submitted

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff

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The court failed to make any of the aforesaid proposed findings requested by plaintiff.

Thereafter plaintiff submitted an opening brief, defendant submitted a brief in its behalf, and plaintiff submitted a reply brief. The case was thereafter orally argued to the court, and thereupon counsel for both parties submitted the cause to the court for its judgment and decision.

Thereafter the court, after due consideration, rendered its decision that plaintiff take nothing by its said action and that special findings of fact and conclusions of law would be made. Thereafter the court made and filed its findings [74] of fact and conclusions of law, in words and figures as follows:

“[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

The above entitled cause came on regularly for trial and was tried before the Court, Honorable Harold Louderback sitting as Judge thereof, a jury having been waived by written stipulation filed by the parties. The parties appeared by their re-

spective counsel and evidence, both oral and written, was introduced. The cause was argued orally and upon briefs and duly submitted for decision. The Court having considered the evidence and the law applicable thereto and being fully advised in the matter, hereby makes its decision and its findings of fact and conclusions of law.

### Findings of Fact

The Court finds the facts to be as follows:

#### I.

Plaintiff is a corporation, wholly owned and controlled by El Dorado Oil Works, a corporation engaged in the production and shipment of coconut oil. Defendant, General American Tank Car Corporation, is the owner of certain tank cars and is engaged, among other things, in furnishing these cars [75] under contract to shippers for the transportation of coconut oil and other liquid commodities.

#### II.

On September 28, 1933, defendant entered into a written agreement with El Dorado Oil Works with respect to the furnishing of tank cars for use by said El Dorado Oil Works in the transportation of its products. A copy of said agreement is attached as "Exhibit A" to defendant's answer to the complaint. On or about October 31, 1934, said El Dorado Oil Works assigned and transferred all of its right, title and interest in and to said agreement, and in the cars therein referred to, to plaintiff. Defendant consented to said assign-

ment. Plaintiff has been a wholly owned and controlled subsidiary of said El Dorado Oil Works at all times since the making of said assignment. Prior to the commencement of this action and on May 1, 1935, said El Dorado Oil Works duly assigned and transferred to plaintiff by written instrument all claims and demands of said El Dorado Oil Works against defendant arising out of said agreement.

Under said agreement defendant leased to said El Dorado Oil Works 50 tank cars, which are referred to in the agreement as 'permanent cars', at the rental of \$27.50 per car per month. The said agreement also provided that defendant would furnish said El Dorado Oil Works its entire requirement of tank cars over and above the 50 permanent cars, at a rental of \$30. per car per month. It was further provided that defendant should each month credit to the rental or service account of said El Dorado Oil Works all mileage earned by the cars while in the service of said El Dorado Oil Works according and subject to all rules of the tariffs of the railroad common carriers over whose lines said cars should be transported. The said agreement was to remain in effect for a period of three years beginning [76] January 1, 1934, and ending December 31, 1936. The said El Dorado Oil Works was given the right to extend the term of said agreement for an additional two years provided it gave defendant notice in writing on or before December 1, 1936 of its election so to extend said agreement.

## III.

The tank cars leased by defendant to said El Dorado Oil Works and to plaintiff as provided in said agreement were used during the times specified in said complaint in the transportation of property of said El Dorado Oil Works and of plaintiff over the lines of railway of common carriers subject to that certain statute of the United States of America entitled 'An Act to further regulate commerce with foreign nations and among the states' (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act. Such transportation was almost entirely in interstate or foreign commerce. More specifically, ninety-nine (99) per cent or more of said shipments in said tank cars were interstate in character. Under the terms of the tariffs of said common carriers published and filed with the Interstate Commerce Commission in the manner required by law certain mileage payments were and are made by such carriers for the use of privately owned cars employed in the transportation of property over the lines of railway of such common carriers according as their respective lines of railway may run.

## IV.

During the period extending from January 1, 1934, to June 30, 1934, it was the practice of defendant under said agreement to credit to said El Dorado Oil Works all of the mileage earnings collected and received on said tank cars from said common carriers and to pay over to said El Do-

rado Oil Works each [77] month all of said mileage earnings in excess of the car hire or rental reserved in said agreement. On July 2, 1934, the Interstate Commerce Commission rendered its decision in I. & S. Docket No. 3887, *Use of Privately Owned Refrigerator Cars*, 201 I.C.C. 323. A copy of said decision, marked 'Exhibit 1', is attached to and made a part of the stipulation of facts entered into between plaintiff and defendant and presented in this proceeding. Following the rendition of said decision defendant was advised by counsel and concluded that the crediting and payment to plaintiff of mileage earnings, received from the aforesaid railroad companies, in excess of the car hire or rental reserved in said agreement was prohibited by and would be in violation of said Elkins Act. As a consequence of such decision and such advice and conclusion defendant has refused to pay over to said El Dorado Oil Works or to plaintiff such excess mileage earnings collected by defendant after May 31, 1934.

#### V.

During the period from the 1st day of January, 1934, to and including the 31st day of October, 1934, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$22,807.79 and credited thereof the sum of \$21,889.14 to the account of El Dorado Oil Works. The amount of the mileage earnings, in excess of the car rental, withheld by defendant for said period was and is

the sum of \$918.65. During the period between the 1st day of November, 1934, and the 31st day of May, 1935, defendant collected and received from the railroad companies, over whose lines of railway the shipments involved were transported, the sum of \$28,595.79 and credited thereof, the sum of \$10,981.66 to the account of plaintiff. The amount of the mileage earnings, in excess of the car [78] rental, withheld by defendant for said period was and is the sum of \$17,614.13. The total mileage earnings, in excess of the car rental, withheld by defendant for the entire period from January 1, 1934, to May 31, 1935, were and are the sum of \$18,532.78. Defendant has credited said El Dorado Oil Works and plaintiff with all of the mileage earnings in the complaint and in said agreement referred to, in an amount or amounts equal to the car hire or rental reserved in said agreement.

## VI.

There was and is no corporate relationship between defendant, General American Tank Car Corporation, and any of said rail carriers over whose lines of railway said shipments of El Dorado Oil Works and plaintiff were transported.

## CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

### I.

That defendant was and is prohibited and enjoined by law, and particularly by the provisions

of that certain statute of the United States of America entitled 'An Act to further regulate commerce with foreign nations and among the states' (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49, Sec. 41), commonly known as the Elkins Act, from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.

## II.

That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or [79] rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.

## III.

That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage earnings as were not in excess of the car hire or rental reserved in said agreement.

IV.

That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.

**HAROLD LOUDERBACK**

District Judge

Approved as to form, as provided in Rule 22.

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff."

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Thereafter and on September 2, 1937 the Court made and entered judgment whereby it was ordered and adjudged that plaintiff taken nothing by its said action and that defendant have and recover from plaintiff its costs and disbursements. [80]

Within ten days after service upon plaintiff of written notice of entry of judgment in this cause, the above entitled court did, with written consent of counsel for defendant, by its order duly given and rendered, made and filed herein, extend the time within which plaintiff might prepare, serve and lodge its draft of its bill of exceptions herein for twenty days and the above entitled court did, with written consents of counsel for defendant, and within said twenty days extension and within each successive extension similarly duly given, by its orders duly given, rendered, made and filed herein, successively extend the time within which the plaintiff might prepare, serve and lodge its draft of its bill of

exceptions herein to and including the 13th day of November, 1937.

The foregoing constitutes all of the proceedings had herein.

Within the time required by the law and the rules and orders of the court herein, and on the 12th day of November, 1937, plaintiff El Dorado Terminal Company, a corporation, duly served, presented and lodged herein its proposed bill of exceptions for examination by defendant and appellee and for approval of the Court.

Thereafter and within the time required by law and the rules of the above-entitled court as enlarged and extended by stipulation of the parties and on the 15th day of January, 1938, defendant and appellee duly served, presented, and lodged its proposed amendments to the proposed bill of exceptions of plaintiff and appellant. Thereafter and on the 17th day of January, 1938 plaintiff and appellant served and on the 18th day of January, 1938, filed herein its Notice of Presentation of said bill of exceptions and proposed amendments thereto, of which the following is a copy:

Receipt of a copy of the within  
Notice is hereby acknowledged this  
17th day of January, 1938.

MCCUTCHEN, OLNEY, MANNON & GREENE  
Attorneys for Defendant. [81]

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF BILL  
OF EXCEPTIONS AND AMENDMENTS

To the Defendant Above Named, and to Messrs.  
McCutchen, Olney, Mannon & Greene, Its  
Attorneys:

You and each of you will please take notice, that on the 24th day of January, 1938, at the hour of ten o'clock A. M., or as soon thereafter as counsel may be heard, plaintiff and appellant, El Dorado Terminal Company will present to the Honorable Harold Louderback, at his Courtroom in the Federal Post Office Building at San Francisco, California, its Proposed Bill of Exceptions in the above entitled action together with amendments proposed by defendant above named for settlement.

Dated: January 17, 1938

WILLIAMSON & WALLACE  
Attorneys for Plaintiff

[Endorsed]: Filed January 18, 1938

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Thereafter and pursuant to successive stipulations of the parties the presentation of said bill of exceptions and proposed amendments was continued to February 15, 1938, on which date, pursuant to said Notice and said stipulation, said bill of [82] exceptions and said proposed amendments was duly presented to the court and to the judge thereof who tried the above-entitled cause. Said court on that

said proposed amendments, and allowed certain of said proposed amendments and disallowed others thereof.

By stipulation and order filed herein on November 15, 1937, the term of court and the time within which plaintiff and appellant might have a Bill of Exceptions settled and allowed was enlarged and extended to and including the 12th day of January, 1938, and by stipulation and order filed herein on January 4, 1938 said times and term were extended and enlarged to including the 25th day of January, 1938, and by stipulation and order filed herein on January 18, 1938, said times and term were enlarged and extended to and including the 25th day of February, 1938, and by stipulation and order filed herein on February 24th, 1938, said times and term were continued to and including the 25th day of March, 1938. Copies of said stipulations and orders follow:

[Title of District Court and Cause.]

### STIPULATION AND ORDER

It is hereby stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 12th day of January, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: November 12, 1937.

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff and  
Appellant

**McCUTCHEN, OLNEY**

**MANNON & GREENE**

Attorneys for Plaintiff and  
Appellant

It Is So Ordered, Nov. 15, 1937.

**HAROLD LOUDERBACK**

District Judge

0 days previous extension by stipulation.

[Endorsed]: Filed November 15, 1937;

[83]

[Title of District Court and Cause.]

### STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 25th day of January, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: January 4, 1938.

WILLIAMSON & WALLACE

Attorneys for Pltf. and Applt.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for Deft. and

Applee.

It Is So Ordered Jan. 4, 1938.

HAROLD LOUDERBACK

District Judge.

60 days previous extension by stipulation.

[Endorsed]: Filed Jan. 4, 1938.

[Title of District Court and Cause.]

### STIPULATION AND ORDER

It Is, Hereby Stipulated by and between the parties hereto that the time within which plaintiff and appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 25th day of February, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: January 18, 1938.

WILLIAMSON & WALLACE

Attorneys for Pltf. and Applt.

McCUTCHEN, OLNEY,

MANNON & GREENE

Attorneys for Deft. and

Applee.

It Is So Ordered Jan. 18, 1938.

**HAROLD LOUDERBACK**

District Judge.

55 days previous extension by stipulation.

[Endorsed]: Filed Jan. 20, 1938.

[84]

[Title of District Court and Cause.]

**STIPULATION AND ORDER**

It Is Hereby Stipulated by and between the parties hereto that the time within which plaintiff and, appellant, El Dorado Terminal Company, a corporation, may have a Bill of Exceptions settled and allowed is enlarged and extended to and including the 28th day of March, 1938, and the term of Court is extended and enlarged accordingly, and to said day.

Dated: February 23, 1938.

**WILLIAMSON & WALLACE**

Attorneys for Pltf. and Applt.

**McCUTCHEN, OLNEY,**

**MANNON & GREENE**

Attorneys for Deft. and  
Applee.

It Is So Ordered Feb. 24, 1938.

**HAROLD LOUDERBACK**

District Judge.

85 days previous extension by stipulation.

[Endorsed]: Filed Feb. 24, 1938.

By stipulation and order duly filed in the U. S. Circuit Court of Appeals for the Ninth Circuit on December 18, 1937, the time within which plaintiff and appellant might file its transcript and record on appeal, the time within which it might file its record in said Circuit Court of Appeals, the time for docketing its cause in said court and the return day on the citation issued upon the allowance of its said appeal was duly extended and enlarged to and including the 25th day of January, 1938, and by stipulation and order duly filed on January 20, 1938, said times were duly extended and enlarged to and including the 25th day of February, 1938, and by stipulation and order duly filed on February 24, 1938 said times were duly extended and [85] enlarged to and including the 28th day of March, 1938.

And Now, within the time required by law and the rules and orders of the court herein, the plaintiff and appellant having presented its proposed bill of exceptions and defendant and appellee having proposed amendments thereto and the court having ruled thereon and determined upon the contents of the engrossed bill of exceptions, plaintiff and appellant El Dorado Oil Works, a corporation, presents and lodges the foregoing engrossed bill of exceptions for settlement and approval by the court.

Wherefore, it is prayed that this engrossed Bill of Exceptions be settled, allowed and approved as plaintiff's Bill of Exceptions on its appeal from the

Order and Judgment in the above entitled action, and for all purposes for which a Bill of Exceptions may be used, and to the end that the foregoing matters may be made matters of record.

Dated: March 14th, 1938.

WILLIAMSON & WALLACE  
Attorneys for Plaintiff. [86]

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CERTIFICATE AND ORDER SETTLING,  
ALLOWING AND APPROVING  
ENGROSSED BILL OF EXCEPTIONS

I, Harold Louderback hereby certify that I am a Judge of the United States District Court for the Northern District of California, designated and assigned to sit and act as recited in the foregoing Engrossed Bill of Exceptions; that the above entitled cause was tried before me, sitting without a jury and in the said and above entitled Court, and that all of the proceedings had therein, and all proceedings and other matters had and which happened as recited in the foregoing Engrossed Bill of Exceptions were had and happened before me, sitting as aforesaid, (excepting only matters recited in respect of removal of the above entitled cause into the above entitled Court as recited in the foregoing Bill of Exceptions which matters appeared of record before me upon the trial of the above entitled cause as recited in the foregoing Bill of Exceptions); that within the term at which the proceedings upon the trial of the above entitled

cause, and within the term at which all of the proceedings herein were had, as recited in the foregoing engrossed Bill of Exceptions and within the time allowed by law and the rules and orders of the Court, plaintiff El Dorado Terminal Company, a corporation, prepared and served upon the defendant above named and lodged herein its foregoing bill of exceptions, and within said time and term this certificate and order of settlement and allowance thereof is made and now, the premises considered and the Court being fully advised,

It Is Hereby Ordered that the prayer of the foregoing Engrossed Bill of Exceptions be and the same is hereby granted; and

It Is Further Ordered, Adjudged and Decreed That the foregoing Engrossed Bill of Exceptions is full, true and [87] correct and contains all of the proceedings in the above entitled cause, all of the proceedings of the trial thereof, and all of the evidence offered and introduced therein;

And It Is Further Ordered, Adjudged and Decreed, that said Engrossed Bill of Exceptions is approved, settled and allowed, and that it be filed and made a part of the record herein, and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, accordingly.

Done this 17th day of March, 1938.

HAROLD LOUDERBACK

United States District Judge

[Endorsed]: Filed: March 18, 1938.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable the District Court of the United States of America for the Northern District of California, Southern Division:

Petitioner El Dorado Terminal Company, a corporation, plaintiff in the above entitled cause respectfully shows:

The above entitled action was and is an action at law prosecuted against General American Tank Car Corporation, a corporation, and in said action and pursuant to decision and order made on or about July 3, 1937, by the court a judgment in favor [89] of defendant and against plaintiff was given, made and entered on the second day of September, 1937. Said judgment was entered in the office of the Clerk of the above entitled Court in Judgment Register 16 at page 598 thereof.

Your petitioner, El Dorado Terminal Company, a corporation, plaintiff in the above entitled action deems itself aggrieved by the said decision and order of the Court and by the judgment of the Court made and entered thereon and by reason of the actions, rulings and decisions of the above entitled Court during said trial, which said actions, rulings and decisions your petitioner deems were errors committed to the prejudice of your petitioner, all as more particularly set out in the assignment of errors, which is filed herewith. Your petitioner desires to take an appeal from said judgment to the United States Circuit Court of Appeals for

the Ninth Circuit, sitting in San Francisco, State of California, pursuant to provisions of law in such cases made and provided, for the reasons specified in the said assignment of errors which is filed herewith.

Wherefore your petitioner prays that this petition be granted and that said appeal of your petitioner be allowed; that this Court make its order allowing petitioner to prosecute its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the laws of the United States in such cases made and provided, to the end that said assigned errors may be corrected and such decision and judgment may be reviewed and reversed; and that this Court make an order fixing the amount of the cost bond which said plaintiff shall give and furnish upon said appeal; that a citation issue and that a transcript of the record, proceedings, and papers in this cause, duly [90] authenticated, be sent to the said United States Circuit Court of Appeals, sitting at San Francisco, California.

Dated at San Francisco, California, this 26th day of November, 1937.

**WILLIAMSON & WALLACE**  
Attorneys for Plaintiff.

Receipt of a copy of the within Petition for Appeal admitted this 26th day of November, 1937.

**McCUTCHEN, OLNEY,  
MANNON & GREENE**

[Endorsed]: Filed: Nov. 26, 1937.

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes Now El Dorado Terminal Company, a corporation, plaintiff in the above entitled cause, by its attorneys Messrs. Williamson & Wallace, and makes and files the following assignment of errors upon which it will rely in the prosecution of its appeal in the above-entitled cause, petition for which appeal is filed at the same time as this assignment of errors, and assigns errors which it deems were errors committed to its prejudice upon the trial of the above-entitled action, as follows: [92]

#### I.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that plaintiff is entitled to judgment against defendant in the sum of \$18,532.78, being the sum admitted by defendant and accepted by plaintiff as correct, together with interest thereon at 7% per annum from the dates when due, and with plaintiff's costs herein. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil [93] of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters per-

taining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars [94] available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did

use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited

upon its books to plaintiff and El Dorado Oil Works; [95] the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant

of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke.) [96]

## II.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that there was no prohibition in the so-called Elkins Act, either at the date of the execution of the contract in question, or at any time up to the date of trial, applicable to the payment of mileage earned by tank cars used as said tank cars were used by El Dorado Oil Works and plaintiff under the terms of the contract with defendant. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to

defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2); [97]

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El

Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of [98] the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general

and during the period in question could not, did not, did not attempt to, and did not have to; by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff [99] pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings rep-

representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiffs upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke.) [100].

### III.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that there was nothing in the railroad tariffs or any regulation of the rail-

roads, or otherwise, prohibiting payment of mileage earned by lessee of tank cars prior to August 29, 1935. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The applicable published railroad tariffs in effect from the date the contract herein involved was made until commencement of this suit provided for and permitted payment by railroads of mileage for tank cars of private ownership to the owner or party who had acquired the cars (Plaintiff's Exhibit No. 3 and Stipulation by Counsel thereto).

Payment of mileage on movements of tank cars is based and governed by published railroad tariffs approved by the Interstate Commerce Commission; and all sums derived from defendant as mileage earned are based on those tariffs. No payments by

any railroad to defendant were made with respect to the use of the leased tank cars here involved except as permitted by published tariff (Testimony of Mr. Smith). [101]

#### IV.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that the freight on all of the cars leased by the El Dorado Oil Works and by plaintiff from defendant under the contract of September 28, 1933 was paid in the amounts and at the times and in all respects as required by the applicable railroad tariffs. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments in the leased tank cars in question by El Dorado Oil Works and plaintiff were made

pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works is located. Neither El Dorado Oil Works nor plaintiff ever paid the freight upon shipments of their cocoanut oil in the tank cars leased from defendant under the contract in question, but the real consignee paid the freight in each case. El Dorado Oil Works and plaintiff had no dealings with the railroads relating to freight (Testimony of Mr. Barrows); [102]

The published Consolidated Freight Tariff referred to at the trial governed payment of freight on the shipments in question (Testimony of Mr. Ayers and Mr. Emerson):

El Dorado Oil Works and plaintiff had no agreement with any railroad relative to so-called rebates. (Statement of Counsel for defendant). [103]

## V.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that all said freight money was paid by the consignees of the goods shipped by El Dorado Oil Works and/or plaintiff. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected

said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments by El Dorado Oil Works and plaintiff made in the leased tank cars in question were made pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works was located. Neither El Dorado Oil Works nor plaintiff ever paid the freight upon any shipment in tank cars leased from defendant pursuant to the contract in question, but the freight was paid by the real consignee in each case. (Testimony by Mr. Barrows)

[104]

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that none of said consignees was a party to the contract between El Dorado Oil Works and defendant or party to any contract whatsoever in respect of the rental or use of said tank cars. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the

pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract involved, made and entered between El Dorado Oil Works and defendant only on September 28, 1933, is attached to defendant's answer as Exhibit A, which contract governs the use and rental of the tank cars involved. (Stipulation of the parties read and received at the trial.) [105]

## VII.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that neither at the time that said contract between El Dorado Oil Works and defendant was made; nor at the time that said contract was to take effect, nor at any time during the period covered by plaintiff's claim herein against defendant was there any rule, regulation or order of the Interstate Commerce Commission prohibiting the making or carrying out of such contract or the payment or credit by the defendant to its lessee of mileage earned, as provided in said contract. Said action of the Court was and is against the law

and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The handling of tank cars leased under the contract in question was done under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published railroad tariffs approved by the Interstate Commerce Commission, and all sums derived from defendant as mileage [106] earned are based on those tariffs. No payments were made with respect to the uses of the particular tank cars by any railroad except as permitted by published tariff. (Testimony of Mr. Smith);

The applicable published railroad tariffs provided for and permitted that mileage for the use of tank

cars would be paid by the railroads to the car owner or to the party who had acquired the cars. This provision was in effect during all the period involved here. (Plaintiff's Exhibit No. III and Stipulation of counsel thereon);

A decision of the Interstate Commerce Commission relied upon by defendant did not apply to tank cars. (Stipulation and statement of counsel) [107]

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that at the time the contract involved herein was made; on September 28th, 1933, and at all times since, the railroads serving the San Francisco Bay area have never held themselves out or been obligated by published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for shipping coconut oil from shippers in the Bay area to consignees in the areas to which oil of El Dorado Oil Works and plaintiff was shipped. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The Western Pacific, Southern Pacific and Santa Fe railroads, serving the San Francisco Bay area never have held themselves out nor have ever been obligated by law or their tariffs or otherwise to furnish tank cars of the type required for, or capable of use by shippers, including shippers of coconut oil out of said area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question state that railroads in [108] general were not required nor did they hold themselves out to furnish tank cars to shippers of coconut oil (Plaintiff's Exhibit No. III and Stipulation of counsel thereon) [109]

## IX.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that the railroads during the period in question have been unable and have not had the equipment or facilities to meet even a small part of the tank car requirements of shippers of coconut oil from the San Francisco Bay area. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support justify that action and the

Court could have ruled and decided from the evidence only in favor of plaintiff as requested, and said proposed finding was necessary, relevant and material from issues raised by the pleadings and at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which their coconut oil was shipped any tank cars of the requisite type, nor were railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony of Mr. Barrows);

The railroads serving the San Francisco Bay area over which El Dorado Oil Works and plaintiff made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare [110] and isolated instances did these railroads have these cars available and only in such

rare cases did the railroads furnish their own tank cars to shippers; plaintiff and other similar shippers were unable to ship their coconut oil in railroad tank cars but were forced to and did use their own tank cars or cars required by them for shipment of their coconut oil; said railroads, in general and during the period involved could not and did not furnish or offer to furnish facilities for shipping coconut oil from San Francisco Bay area (testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question show that railroads did not have the facilities for shipping coconut oil (Plaintiff's Exhibit No. 3, Stipulation of Counsel thereon, and testimony of Messrs. Ayers, Emerson, and Christie). [111]

## X.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that defendant during the period in question had no relation with the railroads serving the San Francisco Bay area as to tank cars leased under the contract involved except as to checking the movement of said tank cars and receiving mileage earnings according to published tariffs. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested,

and material from issues raised by the pleadings at the trial. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

There was no corporate relationship between defendant and any of the railroads (Stipulation of Counsel);

There was no agreement between defendant and the Western Pacific, Southern Pacific or Santa Fe, or any railroad, for the movement of tank cars of defendant, nor for the payment of mileage. Mileage payments are made pursuant to and based upon applicable published mileage tariffs only. Defendant owned all tank cars leased under the contract involved herein. Handling of tank car movements was done solely under published tariffs approved by the Interstate Commerce Commission (Testimony of Mr. Smith). [112]

## XI.

The Court erred in failing to find and decide as requested by plaintiff during the trial and at the close of all the evidence that neither the contract in

certain mileage earnings by defendant, nor the credit and payment over of such earnings was or is illegal, or in violation of or prohibited by the so-called Elkins Act or any regulation or order made thereunder. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented there; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil [113] of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank Cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works of plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually [114] furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie):

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having

such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over [115] rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of

May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [116]

## XII.

The Court erred in failing to order decision and judgment against defendant and in favor of plaintiff as requested by plaintiff at the close of all the evidence and during the trial. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify that action and the Court could have ruled and decided from the evidence only in favor of plaintiff as requested. Plaintiff requested said ruling and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this

cause and upon all the evidence offered and received at the trial thereof, and especially upon competent substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934, and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel).

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1,552.16 as alleged in the complaint (Plaintiff's Exhibit 2);


There was no corporate relationship between defendant and any railroad over whose lines shipments of coconut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

[117]

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage pay-

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ments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission, (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which coconut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired [118] by them for ship-

ment of their coconut oil; in order to ship their coconut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping coconut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping coconut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of coconut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such

mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage [119] earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934, were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipu-

lation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Sölenke). [120]

### XIII.

The Court erred in ordering decision and judgment against plaintiff and in favor of defendant, contrary to motion and request by plaintiff at the trial for decision and judgment in its favor. Said action of the Court was and is against the law and there is insufficient evidence, nor is there any evidence to support or justify the order, decision and judgment of the Court and the Court could have acted and decided from the evidence only in favor of plaintiff and against defendant, as requested. Plaintiff objected and duly excepted to said action on each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31st, 1934 and defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of cocoanut oil of El Dorado Oil Works and plaintiff were made, and neither El Dorado Oil Works nor plaintiff had any agreement with any [121] railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel);

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping cocoanut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able

to obtain from railroads serving the area from which cocoanut oil was shipped any tank cars of the requisite type, nor were such railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of cocoanut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually furnish their own tank cars to such shippers; plaintiff and [122] other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their cocoanut oil; in order to ship their cocoanut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping cocoanut oil eastward from the San Francisco Bay

area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping cocoanut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of cocoanut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works [123] pursuant to the contract in question was paid monthly by defendant to El Dorado Oil Works until July, 1934, representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continue to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and

plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934 were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934 and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [124]

#### XIV.

The Court erred in failing to make or sign the following proposed additional Finding:

"At the date of said contract between El Dorado Oil Works and defendant, and at all times thereafter, there were in effect published tariffs, approved by the Interstate Commerce Commission, applicable to the movement of said tank cars loaded with coconut oil. In and as a part of said tariffs it was provided that the carrier would pay to the owner, lessee or user

of said tank cars a mileage allowance of  $11\frac{1}{2}$ ¢ per mile travelled by said cars, each of the cars paying according to the mileage travelled on its tracks. The term "mileage earned", as used in said contract, was intended by the parties thereto to refer to the said allowance as so provided for in said tariffs. No other allowance for the movement was made or paid by any of the carriers over whose lines said tank cars moved."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received

at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The published mileage tariffs of the railroads were in effect at all times during the period of the contract herein involved. These tariffs provided for payments by railroads for use [125] of tank cars of private ownership to the owner or party who had acquired the cars (Plaintiff's Exhibit No. III and Stipulation of Counsel thereto).

Tank cars leased from defendant under the contract in question were handled under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published tariffs approved by Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made with respect to the use of the tank cars leased by defendant and herein involved except as permitted by said tariffs (Testimony of Mr. Smith). [126]

## XV.

The court erred in failing to make or sign the following proposed additional Finding:

"There was paid to the common carriers over whose lines said tank cars moved for the transportation of said coconut oil in all said cars leased from defendant under said agreement of September, 1933, the exact rates provided in

and in all respects as required by said published and filed tariffs applicable to such transportation."

Said proposed additional Finding was duly requested by plaintiff after the decision of the court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above entitled court, said rule then being in effect. Said action of the court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

All shipments in the leased tank cars in question by El Dorado Oil Works and plaintiff were made

pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works is located. [127] Neither El Dorado Oil Works nor plaintiff ever paid the freight upon shipments of their coconut oil in the tank cars leased from defendant under the contract in question, but the real consignee paid the freight in each case. El Dorado Oil Works and plaintiff had no dealings with the railroads relating to freight (Testimony of Mr. Barrows).

The published Consolidated Freight Tariff referred to at the trial governed payment of freight on the shipments in question. (Testimony of Mr. Ayers and Mr. Emerson):

El Dorado Oil Works and plaintiff had no agreement with any railroad relative to so-called rebates. (Statement of Counsel for defendant). [128]

## XVI.

The Court erred in failing to make or sign the following proposed additional Finding:

"All said freight money was paid by the consignee or notified parties of the goods shipped by El Dorado Oil Works and/or El Dorado Terminal Company, and none of said consignees or notified parties was a party to the said contract between the El Dorado Oil Works and General American Tank Car Corporation or party to any contract whatsoever in respect of the rental or use of said tank cars."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court

in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, as said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:—

All shipments by El Dorado Oil Works and plaintiff made in the leased tank cars in question were made pursuant to contracts with eastern purchasers, prices being quoted F. O. B. Berkeley, where the plant of El Dorado Oil Works was located. [129] Neither El Dorado Oil Works nor plaintiff ever paid the freight upon any shipment in tank cars leased from defendant pursuant to the contract in question, but the freight was paid by the real con-

signee in each case (Testimony of Mr. Barrows).

A true copy of the contract involved, made and entered between El Dorado Oil Works and defendant only on September 28, 1933, is attached to defendant's answer as Exhibit A, which contract governs the use and rental of the tank cars involved. (Stipulation of the parties read and received at the trial). [130]

### XVII.

The Court erred in failing to make or sign the following proposed additional Finding:

"Neither at the time that said contract between the El Dorado Oil Works and General American Tank Car Corporation was made, nor at the time that the said contract was to take effect, to-wit, January 1, 1934, nor at any time during the period covered by plaintiff's claims against the General American Tank Car Corporation was there any rule, regulation or order of the Interstate Commerce Commission prohibiting the making or carrying out of said contract or the payment or credit by the General American Tank Car Corporation to El Dorado Oil Works and/or plaintiff, its lessee, of any or all mileage earned in respect to the tank cars covered by said contract and as therein provided."

Said proposed additional Finding was duly requested by plaintiff after the decision of the court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff

offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence both oral and documentary, to the following effect:

The handling of tank cars leased under the contract in question was done under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations [131] were applicable. There has been no change since September 28, 1933. Payment of mileage on movement of tank cars is based on published railroad tariffs approved by the Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made

with respect to the use of the particular tank cars by any railroad except as permitted by published tariff. (Testimony of Mr. Smith);

The applicable published railroad tariffs provided for and permitted that mileage for the use of tank cars would be paid by the railroads to the car owner or to the party who had acquired the cars. This provision was in effect during all the period involved here. (Plaintiff's Exhibit No. III and Stipulation of counsel thereon);

A decision of the Interstate Commerce Commission relied upon by defendant did not apply to tank cars. (Stipulation and statement of counsel) [132]

XVIII.

The Court erred in failing to make or sign the following proposed additional Finding:

"The said published tariffs in effect at the time of said agreement between El Dorado Oil Works and defendant was executed and continuously thereafter authorized and provided for payment to the owner or the lessee or user of tank cars used by shippers of coconut oil, at the rate of  $1\frac{1}{2}$ ¢ per mile travelled by said cars over the lines of railroad carriers."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said

rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The published mileage tariffs of the railroads were in effect at all times during the period of the contract herein involved. These tariffs provided for payments by railroads for use of tank cars of private ownership to the owner or party who [133] had acquired the cars (Plaintiff's Exhibit No. III and Stipulation of Counsel thereto).

Tank cars leased from defendant under the contract in question were handled under published tariffs approved by the Interstate Commerce Commission, and no other rules or regulations were applicable. There has been no change since September

28, 1933. Payment of mileage on movement of tank cars is based on published tariffs approved by Interstate Commerce Commission, and all sums derived from defendant as mileage earned are based on those tariffs. No payments were made with respect to the use of the tank cars leased by defendant and herein involved except as permitted by said tariffs (Testimony of Mr. Smith). [134]

XIX.

The Court erred in failing to make, or sign the following proposed additional Finding:

“At the time the contract involved herein was made, on September 28, 1933, and at all times since, none of the railroads serving the San Francisco Bay Area in which plaintiff and El Dorado Oil Works are located, has held itself out or been obligated or required by statute, published tariffs or otherwise to furnish or provide tank cars of the type used or capable of being used for shipping coconut oil from shippers in the bay area to consignees in the areas to which coconut oil manufactured by El Dorado Oil Works was shipped.”

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court

was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

The Western Pacific, Southern Pacific and Santa Fe railroads, serving the San Francisco Bay area never have held themselves out, nor have ever been obligated by law or their [135] tariffs or otherwise to furnish tank cars of the type required for, or capable of use by shippers, including shippers of coconut oil out of said area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question state that railroads in general were not required nor did they hold themselves out to furnish tank cars to shippers of coconut oil (Plaintiff's Exhibit No. III and Stipulation of counsel thereon) [136]

**XX.**

The Court ~~erred~~ in failing to make or sign the following proposed additional Finding:

"All of said railroads serving the San Francisco Bay area at all times during the period from and after September 28, 1933, have been unable and have not had the equipment or facilities to meet the smallest part, to-wit, less than one percent of the tank car requirements of shippers of coconut oil from said bay area, or to provide, except in rare and isolated instances, to said shippers tank cars capable of transporting coconut oil."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pursuant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of the said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which their coconut oil was shipped any [137] tank cars of the requisite type, nor were railroad cars ever used during the period in question by El Dorado Oil Works or plaintiff (Testimony of Mr. Barrows):

The railroads serving the San Francisco Bay area over which El Dorado Oil Works and plaintiff made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation, only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads furnish their own tank cars to shippers; plaintiff and other similar shippers were unable to ship their coconut oil in railroad tank cars but were forced to and did use their own tank cars or cars required by them for shipment of their coconut oil; said railroads, in general and during the period involved could not and did not furnish or offer to furnish facilities for ship-

ping coconut oil from San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling published railroad tariffs during the period in question show that railroads did not have the facilities for shipping coconut oil (Plaintiff's Exhibit No. 3, Stipulation of Counsel thereon, and testimony of Messrs. Ayers, Emerson and Christie). [138]

## XXI.

The Court erred in failing to make or sign the following proposed additional Finding:

"At all times during the aforementioned period General American Tank Car Corporation had no relation, corporate or otherwise, with any of the railroads over which were transported tank cars leased under said contract, or any relation with any of said railroads as to said tank cars except as to checking the movements of said tank cars and receiving from said railroads mileage allowances earned in respect to said cars according to the published tariffs, or any relation with consignees or parties to whom said coconut oil was ultimately destined, or any relation with plaintiff or El Dorado Oil Works except as resulted from the aforementioned contract."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pur-

suant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

There was no corporate relationship between defendant and any of the railroads (Stipulation of Counsel):

There was no agreement between defendant and the [139] Western Pacific, Southern Pacific or Santa Fe, or any railroad, for the movement of tank cars of defendant, nor for the payment of mileage. Mileage payments are made pursuant to and based upon applicable published mileage tariffs only, and were made by the railroads to defendant. Defendant owned all tank cars leased under the contract involved herein. Handling of tank car movements was

done solely under published tariffs approved by the Interstate Commerce Commission (Testimony of Mr. Smith). Defendant's dealings with El Dorado Oil Works and plaintiff resulted solely from the contract herein (Testimony of Mr. Smith). The actual consignee and never El Dorado Oil Works or plaintiff paid the freight upon coconut oil shipped in tank cars leased from defendant under the contract in question. El Dorado Oil Works and plaintiff never dealt in any way with the railroads in reference to freight bills. Coconut oil was shipped to consignees under contract with prices F. O. B. Berkeley (Testimony by Mr. Barrows).

Defendant settled monthly with El Dorado Oil Works or plaintiff in regard to service charges for tank cars leased under the contract in question and mileage payments received by defendant from the railroads. (Testimony of Mr. Solenke) [140]

## XXII.

The Court erred in failing to make or sign the following proposed additional Finding:

"All the aforementioned mileage received by defendant was the exact amount provided in said published tariffs for mileage earned by said tank cars leased to El Dorado Oil Works and plaintiff under said contract."

Said proposed additional Finding was duly requested by plaintiff after the decision of the Court in favor of defendant and ordering judgment in favor of defendant on special findings. Plaintiff offered and requested said additional Finding pur-

suant to Rule 42 of the above-entitled Court, said rule then being in effect. Said action of the Court was and is against the law, and there is insufficient evidence, nor is there any evidence to support or justify said action, and the court could have acted only in favor of plaintiff, as requested, and said proposed additional Finding was necessary, relevant and material from issues raised by the pleadings and at the trial, and was not covered by any Finding of Fact made by the Court. Plaintiff requested said Finding and duly objected and excepted to said action upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all the pleadings and records in this cause and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

Payment of mileage on movements of tank cars is based and governed by published railroad tariffs, approved by the Interstate Commerce Commission; and all sums derived from defendant as mileage earned are based on those tariffs. No payments by any railroad to defendant were made with respect to [141] the use of the leased tank cars here involved except as permitted by published tariff (Testimony of Mr. Smith). [142]

## XXIII.

The Court erred in making and signing its Conclusion of Law No. I, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

“That defendant was and is prohibited and enjoined by law, and particularly by the provisions of that certain statute of the United States of America entitled ‘An Act to further regulate commerce with foreign nations and among the states’ (32 Stat. L. 847; 34 Stat. L. 584; U. S. Code Annotated, Title 49 Sec. 41), commonly known as the Elkins Act, from crediting or paying to either plaintiff or El Dorado Oil Works any mileage earnings received from said common carriers in excess of said car hire or rental reserved in said agreement.”

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this

cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1) [143]

#### XXIV.

The Court erred in making and signing its Conclusion of Law No. II, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

"That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the

Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [144]

## XXV.

The Court erred in making and signing its Conclusion of Law No. III, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

"That plaintiff was lawfully entitled to receive and defendant was lawfully required to pay over to plaintiff under the terms and provisions of said agreement only such car mileage earnings as were not in excess of the car hire or rental reserved in said agreement."

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff.

Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings and Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [145]

## XXVI.

The Court erred in making and signing its Conclusion of Law No. IV, which the Court made from the Findings of Fact made by it pursuant to its order, as follows:

“That defendant is entitled to judgment herein and to recover against plaintiff its costs herein incurred.”

Said Conclusion of Law was and is against the law, and was and is not supported or justified by Findings of Fact of the Court, or any of them, or by said Findings and any implied Finding of Fact of the Court, and the Court could have concluded from its Findings of Fact only in favor of plaintiff. Plaintiff objected and duly excepted to said Conclusion of Law upon each and all of said grounds, and now specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor, are based upon all pleadings and records in this cause, all the Findings of Fact of the Court, and upon the law applicable hereto including the so-called Elkins Act, (codified as modified in T49USCA Ch. 2) and Interstate Commerce Act (T49USCA Ch. 1). [146]

### XXVII.

The Court erred in making and entering, by the Clerk thereof, its judgment against plaintiff and in favor of defendant, contrary to motion and request by plaintiff during the trial and at the close of all the evidence for judgment in favor of plaintiff. Said action and judgment were and are against the law, and there is insufficient evidence, nor is there any evidence or Finding or Findings of Fact to support or justify said action and judgment, and the court could have acted from the evidence and from its Findings of Fact only in favor of plaintiff as requested. Plaintiff requested judgment and duly objected and excepted to said action upon each and all of said grounds, and specifies each and all of said grounds as reasons for the error assigned herein.

Said error and the grounds and reasons therefor are based upon all pleadings, records and findings of fact in this cause, and upon all the evidence offered and received at the trial thereof, and especially upon competent, substantial and uncontradicted evidence, both oral and documentary, to the following effect:

A true copy of the contract in question between defendant and El Dorado Oil Works is attached to defendant's answer; said contract was assigned by El Dorado Oil Works to the plaintiff on or about October 31, 1934 and the defendant assented thereto; the correct amount, if any, for which judgment could be rendered for plaintiff is \$18,532.78 (Stipulation of counsel);

Prior to commencement of this action El Dorado Oil Works assigned to plaintiff its claim against defendant for \$1552.16 as alleged in the complaint (Plaintiff's Exhibit 2);

There was no corporate relationship between defendant and any railroad over whose lines shipments of coconut oil of El Dorado Oil Works and plaintiff were made, and neither El [147] Dorado Oil Works nor plaintiff had any agreement with any railroad carrier with reference to these mileage allowances (Stipulation and admission of counsel).

There was no agreement or other dealings between defendant and the railroads with relation to defendant's tank cars involved herein other than pertaining to checking, routing and collecting mileage for said cars; there was no agreement between said parties pertaining to rebates, and all matters pertaining to handling and receiving mileage payments upon said cars was done solely in accordance with the applicable published railroad tariffs approved by the Interstate Commerce Commission (Testimony of Messrs. Smith, Kais and Solenke);

The freight upon all shipments in defendant's tank cars during the period in question was paid by the real consignees and never by plaintiff or El Dorado Oil Works who had no dealings with any railroad with regard to freight or mileage payments (Testimony of Mr. Barrows);

Tank cars required for shipping coconut oil are of special construction and require special care and El Dorado Oil Works and plaintiff were never able to obtain from railroads serving the area from which coconut oil was shipped any tank cars of the requisite type, nor were such cars ever used during the period in question by El Dorado Oil Works or plaintiff. (Testimony by Mr. Barrows);

The railroads serving San Francisco Bay area over which plaintiff and El Dorado Oil Works made all their shipments did not possess or have available for use by plaintiff or any other shipper of coconut oil from said area tank cars of the particular type required for such transportation; only in rare and isolated instances did these railroads have these cars available and only in such rare cases did the railroads actually [148] furnish their own tank cars to such shippers; plaintiff and other similar shippers were unable to ship their products in railroad tank cars but they were forced to and did use their own tank cars or cars acquired by them for shipment of their coconut oil; in order to ship their coconut oil from San Francisco Bay to Eastern points plaintiff and El Dorado Oil Works were forced to and did acquire all of their tank cars from parties other than railroads and all

of the cars so acquired by them during the period involved were acquired from defendant pursuant to the contract in question; said railroads, in general and during the period in question could not, did not, did not attempt to, and did not have to, by law or otherwise, furnish or offer to furnish or have available tank cars or other facilities for shipping coconut oil eastward from the San Francisco Bay area (Testimony of Messrs. Ayers, Emerson and Christie);

The applicable and controlling tariff items published by the railroads show that the railroads during the period in question did not have the facilities for shipping coconut oil of plaintiff and other similar shippers, did not hold themselves out as having such facilities and were not required by law or otherwise to furnish or to hold themselves out as furnishing tank cars of the particular type required by plaintiff and other shippers of coconut oil (Plaintiff's Exhibit No. III, Stipulation of counsel and testimony of Messrs. Ayers, Emerson and Christie);

Payments by the railroads for mileage earned by defendant's tank cars leased to El Dorado Oil Works and plaintiff pursuant to the contract in question were received by defendant and credited upon its books to plaintiff and El Dorado Oil Works; the books showed that the excess of such mileage receipts over rental charges for the tank cars leased to El Dorado Oil Works pursuant to the contract in question was paid monthly by [149] defendant to El Dorado Oil Works until July, 1934.

representing excess mileage collected by defendant prior to May 31, 1934, and that thereafter such payments were not continued, but such mileage earnings representing mileage payments received by defendant after May 31, 1934, continued to be credited as received from the railroads to El Dorado Oil Works or plaintiff upon defendant's books until commencement of this suit; defendant's books also show that the credit to El Dorado Oil Works and plaintiff of all mileage earnings received by defendant was balanced monthly against debits and the difference representing the excess mileage earnings was carried forward monthly until the credit balance on defendant's books on the last day of May, 1935 showed a credit balance of \$17,759.88 (Testimony of Mr. Solenke);

Payments of excess mileage earnings collected prior to May 31, 1934, were made by defendant to El Dorado Oil Works pursuant to the contract in question, but all mileage collected thereafter was retained by defendant, and not paid to El Dorado Oil Works or plaintiff; said contract between defendant and El Dorado Oil Works and the customary dealings between the parties required payment to El Dorado Oil Works or plaintiff by defendant of the said excess mileage earnings collected after May 31, 1934, and withheld by it. (Stipulation of counsel and testimony of Mr. Barrows, Mr. Kais and Mr. Solenke). [150]

Wherefore, plaintiff, upon the foregoing Assignment of Errors and upon the record in the above entitled cause, prays that the said judgment made

and entered therein on the 2nd day of September, 1937, be reversed, and for such other and further relief as to the court may seem just and proper.

Dated: San Francisco, California, November 26, 1937.

**WILLIAMSON & WALLACE**

Attorneys for plaintiff and  
appellant.

Receipt of a copy of the within Assignment of Errors admitted this 26th day of November, 1937.

**McCUTCHEN, OLNEY,  
MANNON & GREENE.**

[Endorsed]: Filed Nov. 26, 1937. [151]

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[Title of District Court and Cause.]

**ORDER ALLOWING APPEAL AND FIXING  
AND APPROVING BOND**

Plaintiff, El Dorado Terminal Company, a corporation, having duly tendered its costs bond as hereinafter more fully appears, and having duly filed and presented its petition for appeal herein, to the United States Circuit Court of Appeals for the Ninth Circuit, together with its assignment of errors, and praying that an order be made fixing the amount of security which defendant should give and furnish on said appeal, and said petition and assignment of errors having been filed and presented within due time, and upon reading said petition and [152] assignment of errors, and the Court being advised,

It Is Ordered, that said appeal be and the same is hereby allowed to said plaintiff, and there is allowed to said plaintiff review in the United States Circuit Court of Appeals for the Ninth Circuit, of the decision herein, and the judgment heretofore rendered and entered in the above entitled action of the 2nd day of September, 1937, together with all actions, ruling and decisions of this Court duly excepted to and duly presented by bill of exceptions.

It Appearing to the Court that said plaintiff duly tendered herein on the 26th day of November, 1937, its costs bond in the sum of \$250.00 to the effect that said plaintiff and appellant shall prosecute said appeal with effect and, if it fails to make its plea and appeal good, shall answer all costs all as more particularly appears in the terms of said bond, which said bond is dated the 23rd day of November, 1937, and is made and signed by Fidelity and Deposit Company of Maryland, a corporation,

Now It Is Further Ordered that the amount of security which said plaintiff shall give and furnish upon said appeal shall be and is hereby fixed as the sum of \$250.00 to be secured by a good and sufficient costs bond to be approved by the Court, and that said costs bond heretofore duly tendered as aforesaid be and the same is hereby accepted and approved as such.

Dated: San Francisco, California, November 27th, 1937.

HAROLD LOUDERBACK

District Judge

[Endorsed]: Filed Nov. 27, 1937. [153]

[Title of District Court and Cause.]

### STIPULATION RE BOND AND APPEAL

It Is Hereby Stipulated by and between the parties hereto that the Costs Bond tendered by plaintiff above named as and for the Costs Bond on an appeal which plaintiff proposes to take herein is satisfactory in form, may be approved by the Court, and may be filed for all purposes for which said bond may be used, and as an Appeal Costs Bond herein.

The above entitled Court may make its order accordingly.

Dated: November 24, 1937.

**WILLIAMSON & WALLACE**

Attorneys for plaintiff and  
appellant.

**McCUTCHEN, OLNEY,**

**MANNON & GREENE**

Attorneys for defendant and  
appellee.

[Endorsed]: Filed: Nov. 27, 1937, [154]

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The Premium charged for this bond is \$10.00  
Dollars per annum.

[Title of District Court and Cause.]

### BOND ON APPEAL

Whereas, judgment was entered in the above entitled Court on September 2, 1937, that the Plaintiff take nothing by its action, and that the Defend-

ant have and recover its costs and disbursements as fully set forth in said judgment, and

Whereas, said Plaintiff is dissatisfied with said judgment and is desirous of appealing to the United States Circuit Court of Appeal for the Ninth Circuit, and

Whereas, it is necessary that said Plaintiff, El Dorado Terminal Company, a Corporation, file a cost bond in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars.

Now Therefore, in consideration of the premises, the undersigned Fidelity and Deposit Company of Maryland, a body corporate, duly incorporated under the laws of the State of Maryland and authorized to act as Surety, under the Act of Congress approved August 13, 1894, whose principal office is located at Baltimore, State of Maryland, does hereby undertake and promise on the part of El Dorado Terminal Company, a Corporation, that it will prosecute its said appeal to effect and answer all costs if it fail to make good its plea and appeal, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of, not less than ten days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of

such breach, and render judgment therefor against it and award execution therefor.

Dated at San Francisco, California, this 23rd day of November A. D., 1937.

**FIDELITY AND DEPOSIT**

**COMPANY OF MARYLAND**

By **GUERTIN CARROLL**

Attorney-in-Fact

Copy

Attest:

**C. A. BEVANS**

Attesting Agent

Approved this 27th day of November, 1937.

**HAROLD LOUDERBACK**

District Judge

State of California,

City and County of San Francisco—ss:

On this 23rd day of November, A. D. 1937, before me, Ella Cook Kelly, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, Guertin Carroll, Attorney-in-Fact and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each

of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal]

ELLA COOK KELLY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Jan. 24, 1940.

[Endorsed]: Filed Nov. 27, 1937. [155]

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[Title of District Court and Cause.]

**PRAECIPE FOR TRANSCRIPT OF RECORD  
ON APPEAL**

To the Clerk of the Above Entitled Court:

Plaintiff and Appellant El Dorado Terminal Company hereby requests and directs you to prepare a transcript of record herein for use on the appeal of said plaintiff from the judgment herein and directs and requests you to include therein full, true and correct copies including file marks and endorsements of the following papers herein, prefixing [156] the same with a statement of the names and addresses of the attorneys of record herein, to-wit:

1. This Praecipe;
2. Plaintiff's Complaint as the same appears in the certified transcript of record on removal herein;

3. Order of Removal as the same appears in the certified transcript of record on removal herein;

4. Answer of defendant filed herein September 10, 1935;

5. Stipulation waiving jury filed herein January 27, 1936;

6. Findings of Fact and Conclusions of Law;

7. Judgment dated September 2, 1937 and entered on that day in your office at page 598 of Book 16 of Judgment Register, together with a showing of the date and place of entry of said judgment;

8. Bill of Exceptions of plaintiff and appellant El Dorado Terminal Company, a corporation, filed herein on the 18th day of March, 1937;

9. Assignment of errors of plaintiff and appellant El Dorado Terminal Company, filed herein on November 26, 1937;

10. Petition of plaintiff and appellant El Dorado Terminal Company for appeal filed herein on November 26, 1937;

11. Stipulation re bond and appeal filed herein November 27, 1937;

12. Bond on appeal filed herein November 27, 1937;

13. Order allowing appeal filed herein November 27, 1937;

14. Citation on appeal issued November 27, 1937, and filed herein November 30, 1937.

You will please forward to the Circuit Court of Appeals for the Ninth Circuit the transcript of

record on appeal herein, pursuant to the order settling the Bill of Exceptions.

**WILLIAMSON & WALLACE**

Attorneys for Plaintiff and  
Appellant El Dorado Terminal  
Company.

Receipt of a copy of the within Praecipe for transcript of record on appeal is hereby admitted this 18th day of March, 1937.

**McCUTCHEN, OLNEY,**

**MANNON & GREENE.**

[Endorsed]: Filed Mar. 19, 1938. [157]

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[Title of District Court.]

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 157 pages, numbered from 1 to 157, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of El Dorado Terminal Company, a corporation vs. General American Tank Car Corporation, a corporation No. 19929-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$21.95 and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 23rd day of March A. D. 1938.

[Seal]

WALTER B. MALING

Clerk.

B. E. O'HARA

Deputy Clerk. [158]

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss:

The President of the United States of America to General American Tank Car Corporation, a corporation, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein El Dorado Terminal Company, a corporation, is plaintiff and appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Harold Louderback,  
United States District Judge for the Northern Dis-  
trict of California, this 27th day of November,  
A. D. 1937.

**HAROLD LOUDERBACK**

United States District Judge.

[159]

Service and Receipt of copy of the within Cita-  
tion admitted this 29th day of November, 1937.

**McCUTCHEN, OLNEY,**

**MANNON & GREENE,**

Attorneys for Def't

[Endorsed]: Filed November 30, 1937.

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[Endorsed]: No. 8799. United States Circuit  
Court of Appeals for the Ninth Circuit. El Dorado  
Terminal Company, a corporation, Appellant; vs.  
General American Tank Car Corporation, a cor-  
poration, Appellee. Transcript of Record. Upon  
Appeal from the District Court of the United States  
for the Northern District of California, Southern  
Division.

Filed March 23, 1938.

**PAUL P. O'BRIEN**

Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 8799

EL DORADO TERMINAL COMPANY,

Appellant,

vs.

GENERAL AMERICAN TANK CAR CORPORATION,

Appellee.

DESIGNATION OF PARTS OF RECORD TO  
BE PRINTED

To Appellee Above Named and to Messrs. McCutchen, Olney, Mannon & Greene, Its Attorneys, and to the Clerk of the Above Entitled Court:

Pursuant to Section 8 of Rule 23 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, El Dorado Terminal Company, appellant hereby makes and files its statement of errors upon which it intends to rely and of the parts of the record which it thinks is necessary for the consideration thereof, as follows:

Appellant intends to rely upon each and every error assigned in the Assignment of Errors herein, contained in pages 92-151 incl. of the certified transcript of record on file herein;

Appellant believes and so designates the part of the record necessary for consideration of said errors to be the whole transcript of record on file

herein *save and excepting* therefrom all of the following:

1. That part of the Bill of Exceptions found at page 45 of the certified transcript of record, being the opinion and decision of the Interstate Commerce Commission, No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323, which opinion is attached to said page 45; and

2. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 2nd line of page 75 and concluding with the 23rd line of page 80 of said transcript, being the Findings of Fact and Conclusions of Law of the court below which are also fully set forth at pages 27 to 33, inclusive of said certified transcript; and

3. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 19th line of page 41 and concluding with the 22nd line of page 42 of the certified transcript of record, being a part of the Answer of Defendant (appellee herein) read by counsel for defendant (appellee herein) at the trial, said Answer being set out in full at pages 10 to 25 inclusive of said certified transcript.

Appellant requests the Clerk to omit from the printed record those parts of the certified transcript of record referred to hereinabove.

Dated: San Francisco, March 23, 1938.

**WILLIAMSON & WALLACE**  
Attorneys for Appellant.

Receipt of a copy of the foregoing Designation of Parts of Record is admitted this 23rd day of March, 1938.

McCUTCHEN, OLNEY,  
MANNON & GREENE

Attorneys for Appellee.

[Endorsed]: Filed March 24, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF  
RECORD TO BE PRINTED

To Appellant above named and to Messrs. William-  
son & Wallace, its Attorneys, and to the Clerk  
of the above entitled Court:

Pursuant to Section 8 of Rule 23 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, General American Tank Car Corporation, appellee, hereby designates for printing additional parts of the certified transcript of record on file herein which appellee thinks material, viz.:

1. That part of the Bill of Exceptions found at page 45 of the certified transcript of record, being the opinion and decision of the Interstate Commerce Commission, No. 3887, Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323, which opinion is attached to said page 45; and

2. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 2nd line of page 75 and concluding with the 23rd

line of page 80 of said transcript, being the Findings of Fact and Conclusions of Law of the court below which are also fully set forth at pages 27 to 33 inclusive of said certified transcript; and

3. That part of the Bill of Exceptions found in the certified transcript of record beginning at the 19th line of page 41 and concluding with the 22nd line of page 42 of the certified transcript of record, being a part of the Answer of Defendant (appellee herein) read by counsel for defendant (appellee herein) at the trial, said Answer being set out in full at pages 10 to 25 inclusive of said certified transcript.

Appellee requests the Clerk to include in the printed record those parts of the certified transcript of record referred to hereinabove.

Dated at San Francisco, California, March 31, 1938.

**WARREN OLNEY, JR.**

**ALLAN P. MATTHEW**

**JOHN O. MORAN**

**F. W. MIELKE**

*Attorneys for Appellee*

Service of the within designation and receipt of a copy is hereby admitted this 31st day of March, 1938.

**WILLIAMSON & WALLACE**

*Attorneys for Appellant*

[Endorsed]: Filed March 31, 1938.



**No. 8799**

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**IN THE**

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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**EL DORADO TERMINAL COMPANY,**  
a corporation,

Appellant,

vs.

**GENERAL AMERICAN TANK CAR CORPO-**  
**RATION,** a corporation,

Appellee.

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**Upon Appeal from the District Court of the United States**  
**for the Northern District of California,**  
**Southern Division.**

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**PROCEEDINGS HAD IN THE**  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT.**



United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January  
24, 1939.

Before: Denman, Mathews and Healy,  
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr.  
W. F. Williamson, counsel for appellant, and by  
Mr. Allan P. Matthew, counsel for appellee, and  
submitted to the court for consideration and de-  
cision.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Friday, March 17,  
1939.

Before: Denman, Mathews and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS  
AND FILING AND RECORDING OF  
JUDGMENT.

By direction of the Court, Ordered that the type-  
written opinions this day rendered by this court in  
above cause be forthwith filed by the clerk, and  
that a judgment be filed and recorded in the min-  
utes of this court in accordance with the opinions

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

### OPINION

[Printers Note: Emphasis in this Opinion by the Court.]

Before: Denman, Mathews and Healy,  
Circuit Judges.

Denman, Circuit Judge:

This is an appeal from a judgment denying to appellant, plaintiff below, recovery of moneys collected by the appellee, defendant below, as agent for appellant, from several interstate railways.

The case is at law, the jury was waived and the court based its judgment against appellant El Dorado Terminal Company, hereinafter referred to as the El Dorado Company, on special findings and its conclusions of law.

The El Dorado Oil Works, a corporation owning and operating a vegetable oil refining plant at Berkeley, California, entered into a leasing contract with the appellee General American Tank Car Corporation, hereinafter referred to as the Car Corporation. The Car Corporation leased to the El Dorado Oil Works for three years, from January 1, 1934, 50 specialized coiled tank cars for the carriage of the Oil Works' vegetable oil. The rental for the cars was payable monthly. In the neighbor-

hood of 99 percent of the Oil Works' product is so carried over one or another of three transcontinental railways, into interstate commerce from its Berkeley plant.

The lease was assigned by the Oil Works to the appellant El Dorado Company, the former's wholly owned subsidiary, which brought this suit.

The suit concerns the claimed obligation of the Car Corporation under the car leasing contract to pay over to the El Dorado Company moneys the Car Corporation, the El Dorado's collecting agent, collected from the railways. The moneys were paid by the railways pursuant to a mileage tariff rate, duly filed with the Interstate Commerce Commission, as compensation for supplying them with the specialized coiled tank cars for the carriage by them of the Oil Works' and appellant's vegetable oil. The carriers were not equipped with such cars and the supplying of them by the shipper for the tariff rate had been a practice recognized by the Interstate Commerce Commission for over a quarter of a century.

There is no question concerning the right of the El Dorado Company to sue for breach of the assigned contract and to recover if its view prevail as to the law and facts relative to the collection and payment of the tariff rates.

Under the terms of the contract the Car Corporation was to collect from the several interstate

carriers serving the El Dorado Company the 1½ cents per car mile of the filed tariff rate for supplying to them the tank cars and credit the collections to the El Dorado Company. For 5 months after January 1, 1934, the beginning of the term, the Car Corporation performed this collecting agency contract crediting the El Dorado Company with the collections and making monthly payment to the El Dorado Company of the balance thereof, after deducting the monthly rental of the car lease and certain repair charges.

After July 1, 1934, the Car Corporation declined to pay over any balance to the El Dorado Company. It continued to collect in full from the carriers the tariff mileage, but claimed that all the balance over its monthly rentals and charges, it could keep to its own use. It based its refusal on three contentions:

(1) That the Car Corporation and not the El Dorado Company was the supplier of the cars to the railways; (2) that the monthly rental charge constituted the sole cost to the El Dorado Company in supplying the cars to the railways; and (3) that any amount paid by the railways to the shipper supplying them cars to carry its own oil, above this claimed actual cost to the supplier, reduced the shipper's *transportation cost*, under the freight tariffs and, hence, that the payment by the Car Corporation to the El Dorado Company of the excess of car mileage tariff collections over rentals would

constitute a rebate under the Elkins Act.\* We hold that the Car Corporation has sustained none of these contentions. The case is of novel impression and because of this and of a dictum of the Interstate Commerce Commission, we have given it extended consideration.

\*Section One. \* \* \* [It] shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to \* \* \* [the Interstate Commerce Act] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by \* \* \* [the Interstate Commerce Act], or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor \* \* \*

\* \* \* \* \* Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

32 Stats. at Large, 847, 848;

34 Stats. at Large, 587, 588;

49 USCA §41 (1) and (2).

(1) The lease deprived the Car Corporation of the possession and control of the 50 cars for the three year term and the Car Corporation could not supply them to the railways. This is apparent from the terms of the lease. It required the El Dorado Company to take the cars into its possession and pay the rental for the full three year term whether or not they were used. The purpose of the lease is clear. It is to give to the El Dorado Company a supply of cars devoted solely to meeting its own business requirements. They thus became instantly available for the delivery of its oil to its customers on one or another of the three railways' lines or their connecting carriers. They could be distributed for the service of its future orders.

The Car Corporation had no choice in the railway to be served by any of the cars nor, if they were not used by the El Dorado Company, could the Car Corporation require them to be supplied to any railway for the service of any other shipper. There is no basis for the Car Corporation's claim that it can retain the excess of the mileage collections over rentals because it and not the El Dorado Company supplied the cars to the three railways.

(2) The monthly rentals did not establish the cost of the El Dorado Company in supplying the cars to the carriers, and the Car Corporation has not proved that that cost is less than the mileage earnings of the cars.

The Car Corporation assumes in its pleading of its affirmative defense that it would be a rebate to

pay over to the El Dorado Company any balance above the car rentals and repair charges, and hence a cringe which permits it to retain such balance; and the court assumes in its decision sustaining the claimed defense, that the monthly rentals constituted the total cost of the El Dorado Company in supplying the cars to the carriers.

The Car Corporation has not established that the cost of supplying the cars is less than the mileage earnings. The lease pleaded in the defense not only shows the contrary likelihood but that the rental cost itself is not determined by the monthly payments of \$27.50 for each car. In addition to the monthly rentals, the lease provided for a possible further rental to be paid the Car Corporation at the end of the three years. This additional amount was the excess of tariff rates collected by the Car Corporation from the carriers for the mileage of the empty cars over the mileage for the loaded cars while carrying the El Dorado Company's oil. The El Dorado's cost can be determined only by considering this future added rental.

In determining what constitutes a supplier's cost, the Interstate Commerce Commission has considered its experience with the supplied facilities for a period as long as 18 years. Mileage Allowances on Refrigerator Cars, 218 ICCR 359 and cases cited *infra*. With such a lease it would require a consideration of the El Dorado Company's rationally expected three year supply experience with-

the cars to ascertain its cost of supplying them to the railways, before it could be determined whether the supplying was profitable. This cost calculation would involve much more than the per car monthly rentals plus the additional rental at the end of the three years.

Since the El Dorado Company has possession of the cars, it must provide trackage facilities for their storage and switching. It has the current cost of their administration. It has the cost of clearing the cars, not a simple task when it is considered that any rust or foreign substance on the coils which wind through the oil or on the sides of the cars may spoil the sensitive vegetable product.

During the three years there exist possible liabilities under the lease which easily could wipe out any excess of mileage over rentals. The El Dorado Company must pay the Car Corporation for any damage or destruction to the cars while on its own or its customers' private tracks. The oil is both inflammable and explosive and the contents may destroy the cars; so also may a conflagration or a collision or other happenings on the private tracks. So also the lease places on the El Dorado Company the liability for injury to persons or property caused by the use of the cars. It is a matter of business judgment whether to insure against such risks, if insurance be obtainable.

Also before it can be determined whether the three year lease will create a cost less than the mileage earned by the leased cars, it must be con-

sidered whether the plant will remain in operation. The monthly rentals go on though a fire or earthquake or a strike makes it impossible to manufacture the oil for shipment in the cars. The supply of copra from the Philippines may cease or become so costly that it does not pay to operate. Tariffs on copra may stop profitable manufacture. The rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease.

The Car Corporation has not sustained its burden of proof that the payment of the balances of mileage collections would be more than the added cost and liabilities we have described and the judgment may be reversed on this ground alone. Whether under the new district court rules the complaint could be amended and a new trial had, we leave to the lower court, if the Supreme Court should not agree with our decision on the Car Corporation's third contention, which otherwise disposes of the case.

(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. Such profit does not constitute a rebate prohibited by the Act.

The Elkins Act was passed in 1903. Three years later, in 1906, Congress recognized that despite the command of the Interstate Commerce Act of 1887, the railways were not supplying to specialized industries such facilities as these coiled tank cars. In a statute increasing the penalties of the Elkins Act from a fine to from \$1,000 to \$20,000, to the fine plus, at the option of the sentencing judge, imprisonment for not more than two years,\* Congress also specifically provided for the right of owners shipping goods interstate to supply their carriers with the facilities necessary to the transportation of their products.\*\* That provision of 1906 was added to §15 of the Interstate Commerce Act of 1887. It was later amended in a manner not relevant and the language recognizing this shipper-supplier right now reads:

“§15, par. (13) Allowance for service or facilities furnished by shipper. If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the car-

\*34 Stats. at Large, 584, 588.

\*\*34 Stats. at Large, 590.

rier or carriers for the services so rendered or for the used [use] of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

49 USCA, Chap. 1, §15, par. (13).

The "just and reasonable" "charge and allowance" for providing carriers such instrumentalities as coal cars, log cars (bents), refrigerator cars, tank cars and the like, are required by the first paragraph of §6 of the Interstate Commerce Act, as amended in 1906, to be fixed and stated in their filed and published tariffs. The provision reads:

"§6, par. (1) Schedule of rates, fares, and charges: filing and posting. Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. \* \* \* The schedules printed as aforesaid \* \* \* shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the com-

mission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities, defined in this chapter."

49 USCA, Chap. I, §6, par. (1).

The word "transportation" for which this section requires the filing of rate schedules is defined in paragraph (3) of §1 (49 USCA §1 (3)) as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Hence, the "allowance" for the "service" of furnishing to carriers "transportation", i. e., tank cars, "irrespective of ownership or of any contract, express or implied, for the use thereof", which, under §15, par. (13) a shipper-supplier was permitted to render, is to be determined by "rates" which are to be "stated separately" in the schedules to be filed with the Commission and published by the carrier.

Uniformity of charges for carriers' services was one of the main objectives of the three regulatory acts. The evils of discrimination of one shipper over another had become so great that establishment and publication of uniform tariffs requiring the same charges to all for carriers' services is one of the primary requirements of the Interstate Commerce Act.

The Elkins Act in 1903 reinforced this compulsion for uniformity, by making it a crime for a carrier to deviate from its tariff schedules, and the Hepburn Act increased the penalty to a possible two years' imprisonment. The provision is:

\*\*\* Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to

be the legal rate, *and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.*"

32 Stats. at Lg. 847, 848;

34 Stat. at Lg. 588;

49 USCA §41 (2).

Section 15 of the Interstate Commerce Act §6 recognizing the shippers' right to supply "instrumentalities" to his carrier, provided for a hearing by the Commission on complaint or its own motion to determine whether the rates for rendering any service or furnishing any instrumentality are "just and reasonable", with the power in the Commission to fix a "reasonable" "maximum" charge. 49 USCA §15, (13). When this reasonable maximum is fixed, the carriers file and publish in their schedules a rate of compensation, not more than the reasonable maximum fixed by the Commission.

It is obvious that this compensation by uniform rates to the shipper for supplying services to the carriers in aid of transportation of its own goods would in many cases yield a profit to certain shippers. Uniformity of rate is determined by the Commission, often by a computation of the average of the costs of many suppliers over a prior period of several years. *U. S. Cast Iron Pipe & Foundry Co. v. Director General*, 57 ICCR 677, 685; *Mileage Allowance on Refrigerator Cars*, 218 ICCR 359.

However, such individual economic advantage is inevitable if the Congressional intent of uniformity of charge by fixed rates, applicable to all suppliers, is to be attained. The Supreme Court, in an opinion by Mr. Justice Holmes, in reviewing cases in which the rate for supplying grain elevator facilities to the interstate carriers was reduced from  $11\frac{1}{2}$  cents per 100 pounds to  $\frac{3}{4}$  of a cent, stated: "The law does not attempt to equalize fortune, opportunities or abilities". *Interstate Commerce Comm. v. Duffenbaugh*, 222 U. S. 42, 46. See also same case below, *F. H. Peavey Co. v. Union Pac. Ry.*, 176 Fed: 409, 419, 420.

If the Car Corporation's contention were the law, instead of the required uniformity to all competing industries depending on and using interstate railways, every shipper-car-supplier would have to establish to his carrier for every car supplied, the exact cost to him before the carrier could pay him his compensation. Since, if the railway pay more, it is liable to at least a \$1,000 fine for its payment for each car or cars so used, with a maximum of a two year sentence, we may be sure the many thousands of annual negotiations between shippers and carriers would be most vigorously conducted. The wastage of time and economic effort would be enormous.

Apart from wastage of effort, it would greatly increase the opportunity for rebating and discrimination. The competitive carriers would be pressed to

come to the standard of the "most liberal estimator" of the supplier's cost. In these great industries requiring specialized types of cars, rebating would tend to become universal. Unless the carriers are compelled to supply such specialized tank cars and the shippers are allowed to supply them only in exceptional instances, it is not conceivable that Congress intended the Interstate Commerce Act and Elkins Act should be interpreted as contended by the Car Corporation.

The practice of furnishing private cars by shippers to their carriers after the Interstate Commerce Act was amended in 1906, was recognized in 1910 by the Interstate Commerce Commission in a decision involving the supplying of tank cars. The tariff rate shown then to have been established was  $3\frac{1}{4}$  cent per car mile. *Procter and Gamble Co. v. Cincinnati H. & D. Ry. Co. et al*, 19 ICCR 556, 557, 560.

In 1917 Congress enacted more specific provisions controlling the practice. 40 Stat. 101. This legislation, amended in 1920, in respects not relevant, (41 Stat. 476, 477), adds to Section 1 of the Interstate Commerce Act the following paragraphs:

"(10) The term 'car service' in this Act shall include the use \* \* \* of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, \* \* \* by any carrier by railroad subject to this Act.

"(11) It shall be the duty of every carrier by railroad subject to this Act \* \* \* to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

\* \* \* \* \*

"(13) The [Interstate Commerce] Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

"(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, *including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it*, and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

# MICRO CARD

TRADE MARK 

# 22

# 39



# 1170

# 65



In 1918, the Commission conducted a hearing under the provisions of the 1917 statute to determine, among other things, whether the then published tariffs for the supplying of tank cars should be increased.

The hearing involved a review of the whole question of the supplying of cars to carriers by shippers and the Commission found that the practice, then some 20 years old, drew its supply of cars from some 200,000 not owned by the railways. It decided that such supply by the shippers was advantageous to the movement of interstate commerce and that the method of compensating the shipper was by a uniform rate to be published in the carriers' tariffs, and ordered a continuance of the long established practice to file and publish such rates. It decided that the rates should be computed on the basis of mileage traveled by the shipper's car, both in the carriage of his goods and in the return of the empty cars. It made no provision for any deviation from the uniformity of this rate.

In the particular case of the claim of the shippers supplying leased cars, it held that they "may continue to lease cars to transport their shipments from sources independent of carriers by railroad". With regard to tank cars it held that the then mileage rate in the published tariffs, payable to the shipper, should be increased.

Pertinent portions of the Commission's decision are:

"When a shipper furnishes his own car for transportation of articles in common use and which move in large volume, he relieves the carrier of so much of its obligations as a common carrier. This is true whether the shipper furnishes the car as owner or lessee. Carriers recognize this and make allowances to the owner or controlling shipper, as before stated, for the use of such cars. The question here to be considered is as to the basis of the allowance or payment therefor. \* \* \*

"The act of May 29, 1917, hereinbefore referred to, grants power to the Commission to fix the compensation to be paid for the use of any car not owned by the carrier.

\* \* \* \* \*

"Under all the facts and circumstances shown of record, we [the Commission] find:

"1. That as the situation now exists, and under the circumstances and conditions shown of record, shippers may continue to lease cars to transport their shipments from sources independent of carriers by railroad.

\* \* \* \* \*

"3. That payments should be made by carriers on the basis of the loaded and empty mileage, and that mileage should be computed on the basis of distance tables without the elimination of mileage through switching districts.

\* \* \* \* \*

"5. That the present payment of  $\frac{3}{4}$  cent on the loaded and empty movements for the use of tank cars of all kinds by all carriers by railroad should be increased to 1 cent per mile for the loaded and empty movements; \* \* \*".

In the Matter of Private Cars, 50 I.C.C.R. 652, 680, 681, 709.

Here again it must have been obvious to the Commission that there would be many shippers who would be able to supply tank cars at less than the rate based upon the averages for all. Nevertheless, the Commission held "If private cars are used, they must be under an arrangement stated definitely in tariffs". (Id. 677).

It did so, recognizing that shippers leasing cars would have different rentals, one from another, and hence, that the rental may be profitably less than the tariff. The Commission states this with reference to tank cars for the transportation of cottonseed oil:

"Tank cars for transportation of cottonseed oil or other seasonable articles are, in the main, used by the owners to transport their own traffic, but they lease them at times when not in their own service for any price they can secure, which, of course, varies with different seasons and the needs of the lessees." (Id. 676).

And generally of all cars supplied by shippers:

"The allowance that shall be paid for the use of private cars under all the circumstances and conditions shown must be considered on the average. There can not be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately-owned cars." Id. 683.

Once this average scheduled rate is established, a violation of its uniformity by paying a shipper-supplier of cars a less amount becomes a crime under paragraph (2) §1 of the Elkins Act.

Such averages have determined tank car supplying rates in subsequent cases. See Switching Rates in Chicago District (1931) 177 ICCR 669, 704, et seq.; Mileage Allowance on Refrigerator Cars (1936) 218 ICCR 359, 364, 365.

The Supreme Court recognizes the right to make such rate on a particular service by averaging on the experience of others rendering a similar service, and that its determination is primarily a matter for the Commission. *O'Keefe v. U. S.*, 240 U. S. 294, 302, 303. Cf. *Sprunt & Son v. U. S.*, 281 U. S. 249, 259, where a "level" rate was fixed by the Commission for all carriers.

Since the decision of *In the Matter of Private Cars*, supra, the Commission has raised the tariff

rate on tank cars to  $1\frac{1}{2}$  cents per car mile traveled, both loaded and empty, and as noted, the Car Corporation's answer admits that the schedules of the three carriers to which the El Dorado Company supplied the cars were legally filed. Hence they are binding both on the El Dorado Company and the railway companies.

In *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 ICCR, 166, 168, the shipper supplying the tank cars had been denied any payment, and the Commission awarded it 1 cent a car mile as its compensation for supplying to October 1, 1920, and ordered it be paid after October 13, 1926,  $1\frac{1}{2}$  cents a mile, the later uniform rate.

Such rate uniformity must apply to all shippers. It does not mean that a tariff rate established for a shipper service by certain shippers, and not for other shippers rendering the same service, may not be held invalid for discrimination. This, however, is not a determination that the tariff compensation is not "just and reasonable" for the service rendered, but that it is invalid because it lacks the uniformity of including all shippers within its provisions. *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 511.

Until the Commission determines that the established rate compensation for car supplying, based upon such averages, is not "just and reasonable" under §1, pars. (10) to (14) inclusive of the Interstate Commerce Act, we have no power to deter-

mine that it is not. The Supreme Court has held that the reasonableness is a matter of administrative discretion, and that the courts have not the power to pass on it.

"But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

*Mitchell Coal Co. v. Penna. R. R. Co.*, 230

U. S. 247, 257.

The Car Corporation offers no case arising in the 30 years since the 1906 amendment of §15 of the Act of 1887, recognizing the right of shippers to supply instrumentalities and facilities to their carriers, in which such a shipper-supplier has been prosecuted because he has accepted a tariff rate for his services in excess of its cost. If the Car Corporation's contention be correct, there must have been scores of thousands, if not hundreds of thousands, of such crimes—yet, no Commissioner, rival shipper, or competing community has persuaded a district attorney to attempt the conviction of any offender. Realizing the significance of such absence of cases, the Car Corporation offers the brief of a district attorney on a demurrer to an indictment, where it was claimed that the shipper was not in fact the supplier, and that the lease of the cars to it was a pretense and sham. The Car Corporation's pleading of the El Dorado lease shows it was neither, but a legitimate business transaction.

The Car Corporation cites the opinion of the circuit court in *I. C. C. v. Reichman*, 145 Fed. 235. This case was decided in 1906, shortly before the Hepburn amendment and 11 years before the war service amendment of 1917, under which the Commission fixed the scheduled rates for shippers supplying leased tank cars to their carriers. Though purporting to construe the Elkins Act, it does not consider its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps be-

cause no such car supplying tariff was in existence.

In *U. S. v. Chicago and Alton Ry.*, (CCA-2) 156 Fed. 558, there was not only no tariff filed, and hence no reason to construe par. 2 of §1 of the Elkins Act, but the shipper was held not to have rendered any service to the railway. *Id.* 562. *Aff.* on a divided court, *Chicago and Alton Ry. v. U. S.*, 212 U. S. 563. Cf. *Inland Steel Co. v. U. S.*, 59 S. Ct. 415, 416, where the tariff allowance to shippers for spotting cars in shippers' yards was held not for a service to carrier; *Baltimore & O. R. Co. v. U. S.*, 59 S. Ct. 284, tariff charge for warehousing held not for a transportation service.

In none of the other authorities cited by the Car Corporation\* and not considered above did a court have before it a case where the shipper of the goods exercised his privilege under §15, par. (13) of §1, pars. (13) and (14) of the Interstate Commerce Act, of supplying car service to his carrier. All were cases where the shipper supplying no service to the interstate carrier of the goods, received a rebate from the carrier, or from some third person supplying a facility in the interstate carriage.

The Car Corporation relies on a statement of the Commission in the Refrigerator Car case (*Use of Privately Owned Refrigerator Cars*, 201 ICCR 323) that

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\**Spencer Kellogg & Sons, Inc. v. U. S.*, (CCA-2) 20 Fed. (2d) 459; *U. S. v. Koenig Coal Co.*, 270 U. S. 512; *U. S. v. Michigan Portland Cement Co.*, 270 U. S. 521.

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that *prescribed by the published tariffs* and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act. \* \* \*

"We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate," 201 ICCR 323, 378, 382, 383.

Section 15, par. (13) and §1, par. (14) make no distinction between shippers supplying leased cars from those they own. The Commission has recognized this in fixing the same tariff for both leased and owned cars. In the Matter of Private Cars, *supra*.

Since Section 1, par. (2) of the Elkins Act makes it a crime for the carrier to pay less than its published tariff, as here for tank cars supplied to it under §1, par. (14) of the Interstate Commerce Act, we are constrained to believe that the state-

ment of the Commission in the Refrigerator Car case contemplates a regulation by the Commission prohibiting the use of any tariff rates for supplying refrigerator cars. Their power to do this we are not called upon to decide.

The Commission confines the decision in the Refrigerator Car case to refrigerator cars, and expressly excludes tank cars from its regulation. The reasoning supporting the order on refrigerator cars may or may not be applied in a hearing in which are developed facts concerning tank cars similar to those in that case.

The Commission's power is exercised through its "orders"; "directions", "regulations", or "rules" made upon hearings on specified proposed subjects of regulation. Its reasoning in deciding the regulation of one matter pertaining to interstate transportation does not displace a tariff or rate or practice, recognized as controlling in an entirely different matter. The 1½ cents per car mile tariff for tank cars, recognized in the Paragon Refining case, *supra*, has not been set aside or declared as not "just and reasonable" by any action of the Commission. That tariff still controls the compensation for the supply of tank cars by shippers, whether owned by them, or, as here, held by them through a lease giving them control of their use.

The Car Corporation admits that it holds \$18,532.78 which it should have paid to the El Dorado Company in several monthly payments if its con-

tentions above stated are not sustained; and the El Dorado Company agrees as to the amount involved. Having established no ground for retaining these moneys from its principal and for keeping them for its own use, the Car Corporation owes the El Dorado Company this amount, together with interest computed on the several monthly balances making up the total.

Reversed.

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Mathews, Circuit Judge:

This action was brought by appellant, El Dorado Terminal Company, a California corporation, against appellee, General American Tank Car Corporation, a West Virginia corporation, in a State court of California and, on appellee's petition, was thence removed to the District Court of the United States for the Northern District of California. Jury trial having been waived, the District Court tried the case, made and filed special findings of fact and conclusions of law, and thereupon entered judgment for appellee. From that judgment, this appeal is prosecuted.

The facts are not in dispute. They are, briefly stated, as follows:

Appellant is engaged in the business of producing, shipping and selling coconut oil. For the shipment of such oil by railroad, specially constructed tank cars are required. Common carriers by rail-

road are not required to, and often cannot, furnish such tank cars. Shippers of oil are permitted to, and often do, furnish tank cars for the transportation thereof. Such shippers may be either the owners or the lessees of such tank cars. Appellee is engaged in the business of owning tank cars and leasing them to shippers, who furnish them to carriers for the transportation of oil.

By a contract dated September 28, 1933, appellee leased certain tank cars to appellant,<sup>1</sup> at a specified rental per month, for a term of three years commencing January 1, 1934. The cars were to be and were furnished by appellant to common carriers for use by them in transporting appellant's oil by railroad in interstate commerce, and they were so used. By the contract, it was agreed that appellee would collect from the carriers all compensation<sup>2</sup> payable by them to appellant for the use of the leased cars, "according to and subject to all rules of the tariffs of the railroads," and would credit appellant's rental account each month with the amount thereof, and that, if such compensation

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<sup>1</sup>The contract was between appellee and El Dorado Oil Works, of which appellant is a wholly owned subsidiary. El Dorado Oil Works made the contract for appellant's benefit and, subsequently, with appellee's consent, assigned all its rights to appellant. For present purposes, therefore, the contract may be, and it is here, regarded as a contract between appellant and appellee.

<sup>2</sup>In the contract, this compensation was called mileage.

exceeded the rentals due, appellee would pay the excess to appellant. Thus, by the contract, appellee was made appellant's agent for the purpose of collecting the compensation mentioned and accounting therefor to appellant.

As such agent, appellee did, from January 1, 1934, to May 31, 1935, collect such compensation from the carriers and, from January 1, 1934, to June 30, 1934, did account therefor to appellant. That is to say, from January 1, 1934, to June 30, 1934, appellee credited appellant's rental account each month with the amount of compensation which appellee, as appellant's agent, had collected from the carriers and, as required by the contract, paid the excess to appellant. Thereafter, notwithstanding the contract, appellee retained all compensation collected by it and refused to pay appellant any part thereof. Between June 30, 1934, and May 31, 1935, the excess of such compensation over car rentals was \$18,532.78. To recover that amount, with interest, this action was brought.

Appellee defended on the ground that, although required by the contract, payment of the \$18,532.78 to appellant was prohibited by §1 of the Elkins Act, which provides: "[It] shall be unlawful for

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The complaint prayed for \$21,131.04, but the trial court found that the excess of compensation over car rentals for the period mentioned was only \$18,532.78. This finding is not challenged by appellant.

any person, ~~persons~~, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to [the Interstate Commerce Act], whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by [the Interstate Commerce Act]; or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor \* \* \*

Appellee stated in its answer, and here contends, that if it were to pay appellant any part of the compensation collected from the carriers in excess of the car rentals specified in the contract, such payment would be unlawful, in that appellant "would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act."

This contention, which the trial court upheld, should be rejected. The carriers to which appellant furnished tank cars were and are subject to the Interstate Commerce Act. Paragraphs (10), (11),

(13), (14) and (17) of §1 of the Interstate Commerce Act<sup>5</sup> provide:

“(10) The term ‘car service’ in this Act shall include the use \* \* \* of locomotives, cars,<sup>6</sup> and other vehicles used in the transportation of property, including special types of equipment, \* \* \* by any carrier by railroad subject to this Act.”

“(11) It shall be the duty of every carrier by railroad subject to this Act \* \* \* to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.”

“(13) The [Interstate Commerce] Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules<sup>7</sup> showing rates, fares, and

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<sup>5</sup>41 Stat. 476, 477, 49 U.S.C.A. §1.

<sup>6</sup>Including tank cars.

<sup>7</sup>Such as tank cars.

<sup>8</sup>In §1 of the Elkins Act, these schedules are called tariffs.

charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

“(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, *including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it*, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.”

“(17) The directions of the Commission as to car service \* \* \* may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act \* \* \* to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier \* \* \* to comply with any such order or direction such carrier \* \* \* shall be liable to a penalty of not less than \$100 nor more than \$500 for each offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

\* \* \*

Paragraph 1 of §6 of the Interstate Commerce Act<sup>9</sup> provides:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules<sup>10</sup> showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad \* \* \* when a through route and joint rate have been established. \* \* \*

Paragraph (13) of §15 of the Interstate Commerce Act<sup>11</sup> provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein,<sup>12</sup> the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so

<sup>9</sup>34 Stat. 586, 41 Stat. 483, 49 U.S.C.A. §6.

<sup>10</sup>These are the schedules referred to in paragraph (13) of §1 of the Interstate Commerce Act. In §1 of the Elkins Act, they are called tariffs.

<sup>11</sup>36 Stat. 533, 41 Stat. 488, 49 U.S.C.A. §15.

<sup>12</sup>As, in this case, tank cars were furnished by appellant.

rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. \* \* \*

The carriers to which appellant furnished tank cars complied with the above quoted provisions of the Interstate Commerce Act. They had, long prior to the furnishing of such cars, established rules and regulations with respect to car service, as required by paragraph (11) of §1. They had published and filed with the Interstate Commerce Commission their schedules of rates, fares and charges (sometimes called tariffs), as required by paragraph (1) of §6. Their rules and regulations with respect to car service had been filed with the Commission and incorporated in their schedules, as directed by the Commission,<sup>13</sup> pursuant to paragraph (13) of §1.

These rules and regulations prescribed the compensation to be paid by carriers to shippers for the use of tank cars. The prescribed compensation (three quarters of a cent per car mile) was increased to one cent per car mile by order of the Commission dated July 31, 1918. In the matter of Private Cars, 50 I.C.C. 652, 709. This was increased to 1½ cents per car mile by order of the Commission on or prior to October 13, 1926. *Paragon Refining Co. v. Alton & Southern Railroad*, 118 I.C.C. 166, 168. Thereafter and at all times here pertinent, the prescribed compensation for the use of tank cars was 1½ cents per car mile. This compensation

<sup>13</sup>*Procter & Gamble Co. v. Cincinnati, Hamilton & Dayton Ry. Co.*, 19 I.C.C. 556, 560.

has never been determined by the Commission to be unjust and unreasonable. By paragraph (14) of §1 and paragraph (13) of §15, supra, jurisdiction to make such determination is vested in the Commission, not in the courts. *Terminal Railroad Ass'n v. United States*, 266 U. S. 17, 30.

There never was any statute, rule, regulation, direction or order prohibiting the leasing of tank cars to shippers or the furnishing of leased tank cars by shippers to carriers, or prescribing for their use a compensation greater or less than, or different from, that prescribed for the use of other tank cars, or limiting such compensation to the amount of car rentals paid by such shipper-lessees.

An order thus limiting the compensation payable to shipper-lessees for the use of refrigerator cars was made by the Commission on July 2, 1934, but that order was and is, by its own terms, applicable to refrigerator cars only, and not to tank cars. The opinion<sup>14</sup> which preceded the order contains a dictum to the effect that "the general principles enunciated [in the opinion] apply equally to all other types of private cars," but, obviously, that dictum was not and is not a rule, regulation, direction or order, within the meaning of paragraphs (14) and (17) of §1 or paragraph (13) of §15, supra. It, therefore, did not alter or in any way affect any rule or regulation with respect to tank cars.

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<sup>14</sup>Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323, 382.

Freight paid to the carriers on shipments by appellant was that prescribed in the filed and published tariffs. Compensation paid to appellee, as appellant's agent, for the use of tank cars furnished by appellant was that prescribed in the applicable rules and regulations, which, as we have seen, were part and parcel of the same tariffs. There is, therefore, no basis for the claim that payment of such compensation to appellant was or is prohibited by the Elkins Act.

The judgment should be reversed.

[Endorsed]: Opinions. Filed Mar. 17, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 8799

EL DORADO TERMINAL COMPANY,  
a corporation,

Appellant,

vs.

GENERAL AMERICAN TANK CAR COM-  
PANY, a corporation,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee.

It Is Further Ordered and Adjudged by this Court that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered March 17, 1939.  
Paul P. O'Brien, Clerk.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 19, 1939.

Before: Denman, Mathews and Healy,  
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION  
AND CONCURRENCE UPON PETITION  
FOR REHEARING, AND DENYING PE-  
TITION.

By direction of the Court, Ordered that the type-written opinion and concurrence upon petition for rehearing be forthwith filed by the clerk.

Pursuant thereto, and upon consideration of the petition of appellee, filed April 15, 1939, and within time allowed therefor by rule of court, for a rehearing of above cause; together with supplemental authority, It Is Ordered that said petition for rehearing be, and hereby is denied.

---

[Title of Circuit Court of Appeals and Cause.]

OPINION

○ UPON PETITION FOR REHEARING.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

[Printers Note: Emphasis in this Opinion by the Court.]

Before: Denman, Mathews and Healy,  
Circuit Judges.

Denman, Circuit Judge:

We do not agree with the contention of the Car Corporation's petition for rehearing concerning the importance of the ruling in this case. The power of the Interstate Commerce Commission is plenary. If it regards as no longer in the public interest the continuance of the failure of the railways to supply tank cars and the long established practice of shippers owning or leasing such cars at once to serve their own industries and the carriers, it can, inter

alia, order the carriers to supply the cars to the shippers. It is properly inferable from the petition that even now, over two years after the expiration date of the Car Corporation's lease, the carriers are not required to supply tank cars to the great industries which could not exist without their use.

The petition urges *inter alia* that there is no evidence of any cost to the El Dorado Company in supplying the tank cars to the three railways other than the rental charged by the Car Corporation and hence it must be held that this is the only cost for such supplying. This ignores the fact discussed under (2) of our opinion that the El Dorado Company sued upon the breach of a contract entirely valid as pleaded; that the Car Corporation's answer pleaded the contract in *haec verba*; and that on its face it is valid and enforceable. The petition admits that "It is undisputed that the Car Company was contractually obligated to credit the car mileage revenue to the El Dorado Company \* \* \*".

The contractual obligation was, "Sixth: The First Party shall collect all mileage earned by the cars covered by this agreement and keep all records appertaining to their movements. Second party shall assist first party in following the movements of said cars by furnishing to the first party complete reports of the movements of cars, giving date, routing, and destination of each movement. The first party shall each month credit to the rental or service account of the second party all mileage

earned by said cars while in the service of second party according to and subject to all rules of the tariffs of the railroads."

It is admitted the cars, while in the "service" of the El Dorado Company "earned" the mileage which the Car Corporation collected from the railways. The five immediate and successive monthly payments by the Car Corporation to the El Dorado Company of the balances of these earnings over the lease charges and rentals is a mutual interpretation of the words "credit to the \* \* \* account of" the El Dorado Company as creating a collectible and payable credit of any net balance in favor of the El Dorado Company. There is no merit in the suggestion, first made in the petition for rehearing and contrary to the assumptions of the Car Corporation's briefs and argument, that the suit is prematurely brought by the El Dorado Company because it was only the final balance at the end of the three years that was to be paid by the Car Corporation.

The Car Corporation then asserted an affirmative defense, namely, that the payment by it to the El Dorado Company of any mileage earnings in excess of the car rental of the lease would constitute a crime under the Elkins Act and hence it could retain the excess and need not perform its agreement to pay such excess to the El Dorado Company.

There is no presumption that a lessee of tank cars has no other cost in supplying them to the railways, and our analysis of the lease showed there

were necessarily such added costs which well could exceed the compensation paid by the railways. If the dictum of the Refrigerator Car case (*Use of Privately owned Refrigerator Cars*, 201 ICC, 323, 378, 382, 383) is to be interpreted as stating that a lessee of cars can have no other cost than his rentals under the lease, it obviously is wrong. We do not so interpret the dictum, for the Refrigerator Car case, at page 382, expressly recognizes that there may be other expenses than rentals.

Even if the applicable principle were that it would be unlawful for the Car Corporation to pay over to the El Dorado Company any amount in excess of the latter's cost of supplying the cars to the carriers, the Car Corporation's affirmative defense did not embody this principle, nor did the conclusions of law on which the district court based its judgment. The affirmative defense alleged: " \* \* \* That if defendant were to credit or to pay over to the plaintiff \* \* \* any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, *in excess of the car hire or rental reserved in said agreement* [not in excess of costs], such credit and payment would be unlawful \* \* \* "

The district court, in substance, reiterated this statement in its conclusions of law.

Thus, even under a principle that a shipper-lessee's compensation for car supplying may not exceed its costs, the affirmative defense was inade-

quate and the judgment of the district court was based on an erroneous conclusion of law.

Moreover, our opinion shows that even had the affirmative defense stated that costs of the shipper-lessee's car supplying were less than the mileage earnings, the Car Corporation has not maintained its burden of proof to establish it.

The petition attempts to counter the effect of the second paragraph of section 1 of the Elkins Act, making it a crime for a railway to pay less than a published rate for a car service, by asserting that it was considered in the case of *I. C. C. v. Reichmann*, 145 Fed. 235, 242. In this it is in error. That case quotes section 2 on another matter, but does not consider the carrier's obligation to pay the established rates as required by the second paragraph of section 1.

The discussion under (3) of our opinion assumes that the law requiring the filing of rates for car supplying in the industries using tank cars has been complied with and that there is a duly filed and published mileage tank car rate of  $11\frac{1}{2}$  cents per mile as compensation to all shipper-suppliers for the use of tank cars supplied by them, recognized as filed with the Interstate Commerce Commission in *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 ICC 166, 168. Since there could be a crime committed under the Elkins Act only if there were no rate filed with or established by the Commission providing for the payment of compensation for the

use of cars supplied by a lessee in the position of the El Dorado Company, the Car Corporation had the burden of proving that none was filed or established.

The Interstate Commerce Act requires the filing with or establishing by the Commission of such rates as are paid by the carriers for car supplying, the Elkins Act makes it a crime for the carriers to depart from such rates, e.g. to pay less, and the Car Corporation's answer admits that the mileage tariff payments were for the "use" of the cars in the El Dorado Company's service. The Car Corporation's answer does not allege the absence of a tariff compensating the El Dorado Company, and the court cannot take judicial notice of any of the thousands of tariff provisions filed with the Interstate Commerce Commission. Against the pleading seeking to establish a criminal act, we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company. Since the answer pleads no such defense, it does not support the judgment.

Even assuming a pleading that there is no tariff which provides a compensation to a lessee-supplier, nowhere in the record is there proof of the terms of the tank car mileage tariff rate showing that the money's the Car Corporation seeks to hold were not payable to the El Dorado Company, or proof of the absence of any tariff compensating a shipper-supplier in the position of the El Dorado Company.

Since the burden of proving unlawfulness is on the Car Corporation, we assume the unproved rate is compensation to the lessee car supplier. There is no finding that there is an absence of such a tariff and hence the findings fail to support the judgment.

The record contains certain "rules" of the American Railway Association, providing for the payment by the carriers, often several intercommunicating lines, of the amounts of car mileage due for the tank cars which have been supplied for their hauling. These Association rules make the compensation provided by the mileage rates filed with the Commission payable on the marks of the car owners to such owners in certain cases regardless of whether the owners or their lessees actually supplied the service to the railways. Obviously, this is a matter of convenience, for the great car-owning companies may lease hundreds of single cars to lessees and an accounting by the railways to such individual lessees would create great cost and confusion.

These "rules" of the railways Association refer to, but do not quote, the mileage rate allowance filed with or established by the Commission, giving its designation as "Mileage Tariff No. 7-I, I. C. C. No. 2692". Assuming they were rules of the Commission, which at the same time permits the railways' tariffs to state they are not obligated to furnish tank cars, we cannot construct from them the terms of the mileage rate allowance filed with

the Commission to hold that the performance of the contract contained in the lease would constitute a crime under the Elkins Act.

Petition for rehearing denied.

Mathews, Circuit Judge, concurs in the result.

[Endorsed]: Opinion and Concurrence Upon Petition for Rehearing. Filed May 19, 1939. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

**ORDER STAYING ISSUANCE OF MANDATE**

Upon application of Messrs. McCutchen, Olney, Mannon & Greene, counsel for the Appellee, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including June 30, 1939; and in the event the petition for a writ of certiorari to be made by the Appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

**WILLIAM DENMAN**

United States Circuit Judge

Dated: San Francisco, California, May 19, 1939.

[Endorsed]: Filed May 20, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and forty-eight (348) pages, numbered from and including to and including 348, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of May, A. D. 1939.

[Seal]

PAUL P. O'BRIEN.

Clerk.



## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(4836)

# MICRO CARD

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FILE COPY

In the Supreme Court of the

United States

October Term, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit  
and  
Brief in Support Thereof.

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June 15, 1939.



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# In the Supreme Court of the United States

October Term, 1939

No. ....

GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit.**

*To the Honorable, the Supreme Court of the United States:*

Your petitioner, General American Tank Car Corporation, respectfully prays that a writ of certiorari issue to review the judgment (R. 303, 339) of the United States Circuit Court of Appeals for the Ninth Circuit, entered on March 17, 1939, in a cause numbered and entitled on its docket, No. 8799, *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corpora-*

tion, a corporation, Appellee, reversing a judgment of the United States District Court for the Northern District of California, Southern Division. Petition for rehearing was denied May 19, 1939 (R. 340, 341).

### **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

#### **(a) THE ESSENTIAL ISSUE.**

A single issue of federal law, arising under the Elkins Act, is presented in this cause, although certain subordinate issues, neither presented nor considered in the District Court, were raised for the first time in the opinions of the Circuit Court of Appeals. The essential question involved is whether a shipper, to whom railroad freight cars were leased by a car owning company, may, without violating the Elkins Act, recover from the car owner pursuant to the lease the full amount of the payments received by the car owner from the rail carriers for the use of the leased cars in interstate commerce when it appears that such payments exceed the amount of the shipper's car rental. Specifically the question is whether by such payment the shipper will secure the transportation of its property at a less rate than that named in the published freight tariffs. The Elkins Act provides

"That . . . it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce . . . whereby any such property shall by any device what-

ever be transported at a less rate than that named in the tariffs \* \* \* or whereby any other advantage is given or discrimination is practised." (32 Stat. 847; 34 Stat. 587-588; 49 U.S.C. § 41 (1); Appendix, pp. i, ii).

The material facts appear without controversy. In large measure they were set forth in a written stipulation (R. 45 et seq.).

**(b) NATURE OF SUIT.**

The cause arises out of a suit at law brought by respondent, El Dorado Terminal Company,<sup>1</sup> lessee of certain railroad tank cars from petitioner, General American Tank Car Corporation,<sup>2</sup> the owner and lessor of such cars, to recover from the Car Corporation pursuant to the lease certain moneys hereinafter styled "car mileage" received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the "car mileage", so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. The defense was that the payment of such excess would violate the Elkins Act, in

(1). Respondent, El Dorado Terminal Company, is a wholly controlled subsidiary of its assignor, El Dorado Oil Works. For convenience respondent and its assignor are each, without distinction, referred to hereinafter as the "El Dorado Company".

(2). Referred to hereinafter as the "Car Corporation".

that thereby the El Dorado Company would indirectly secure the transportation of its property at less than the published freight rates. The judgment sought to be reviewed will require the Car Corporation to pay over to the El Dorado Company the excess of the car mileage above the car rental.

**(c) CAR-LEASING AGREEMENT INVOLVED; PERFORMANCE THEREUNDER.**

Prior to the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (July 2, 1934), hereinafter reviewed, the Car Corporation had entered into a written agreement with the El Dorado Company whereby it agreed for a term of three years commencing on January 1, 1934, to lease to the El Dorado Company certain tank cars for the shipment of the latter's products at a specified monthly rental for each car so leased (R. 20-28). It was further agreed that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass, the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service, and would credit the payments so collected to the car rental or service account of the El Dorado Company. (R. 26).

Throughout a period of approximately six months extending from January 1, 1934 to June 30, 1934, inclusive, it was the practice of the Car Corporation in the performance of its contract to credit the car rental account of the El Dorado Company with the full amount of the car mileage payments received by the Car Corporation from the rail carriers, even though they exceeded the car rental, and

to pay over the excess monthly to the El Dorado Company (R. 47-48). The Car Corporation felt compelled to modify its practice following the decision rendered by the Interstate Commerce Commission on July 2, 1934, in.

*Use of Privately Owned Refrigerator Cars, supra,*  
(R. 49).

In this decision the Commission found and concluded, *inter alia*,

"Most of those who lease or rent cars derive monetary profits from the mileage earnings and thereby obtain transportation at less than the published rates." (R. 145.)

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act." (R. 151.)

"The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars." (R. 159.)

"\* \* \* the payment in whole or in part to shippers  
\* \* \* of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers gen-

erally who use cars furnished by the carriers and at less rates than the published rates; \* \* \*." (R. 160.)

Pursuant to this decision, condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage in excess of the car rental. Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage payments to the El Dorado Company in amounts equal to the car rental but withheld payment of the excess. In an agreed statement of facts signed by the parties and received in evidence at the trial (R. 45, 48), it was stipulated, *inter alia*, that the Car Corporation's refusal to pay over this excess was based on its conclusion, upon advice of counsel, following the decision of the Commission referred to above, that such payment would be in violation of the Elkins Act.

The amounts by which the car mileage payments have exceeded the car rental are substantial. It is readily deducible from the ledger sheets reflecting the entire car rental account between the parties covering the period involved in the suit (plaintiff's Exhibit No. 1, R. 182, 183-187) that during the period of seventeen months extending from January, 1934, to May, 1935, both inclusive, the El Dorado Company's car rental amounted to \$25,651.26. It is shown by the record stipulation (R. 45, 46) that the car mileage paid by the rail carriers on the leased cars for the same period aggregated \$51,403.58. The car mileage earned by the cars was, therefore approximately twice the car

rental. Since the car rental provided by the contract was \$27.50 to \$30 per car per month (R. 23), the excess of the car mileage payments over the car rental was not less than an average of \$27.50 per car per month.

The cars leased by the Car Corporation to the El Dorado Company were used in the transportation of the latter's shipments over the lines of common carriers by rail subject to the Elkins Act. Ninety-nine per cent or more of the shipments were interstate in character (Stipulation, R. 47).

(d) **PROCEEDINGS IN COURTS BELOW.**

The El Dorado Company brought suit seeking the recovery of the balance of the car mileage payments so withheld by the Car Corporation, amounting to \$18,532.78. In defense, the Car Corporation pleaded that it was prohibited by law, and particularly by the Elkins Act, from paying over such excess car mileage revenue to the El Dorado Company, in that the El Dorado Company thereby

"would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carrier applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 18.)

A jury was waived. (R. 29.) The District Court sustained the Car Corporation's plea in defense. The Court concluded, *inter alia*:

"That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in

excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act.' (R. 29, 35.)

Judgment was given accordingly for the Car Corporation. (R. 36-37.)

Upon appeal, the Circuit Court of Appeals reversed the judgment of the District Court, holding that the moneys so withheld should be paid over to the El Dorado Company (R. 339, 340).

#### OPINIONS OF THE COURTS BELOW.

The opinions of the Circuit Court of Appeals (R. 304-339; 341-348) are not yet reported. No opinion was rendered by the District Court. Its findings of fact, conclusions of law and judgment are in the record (R. 29-37).

#### STATEMENT OF BASIS OF JURISDICTION.

1. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C. § 347.

2. The judgment of the Circuit Court of Appeals, sought to be reviewed, was entered on March 17, 1939 (R. 303, 340). Petition for rehearing was seasonably filed and was denied May 19, 1939 (R. 340, 341).

### STATUTES INVOLVED.

The case involves the construction and enforcement of the statute of the United States commonly known as the Elkins Act (32 Stat. 847, 34 Stat. 587; 49 U.S.C. § 41 (1) and (2)). The following provisions of the statute of the United States known as the Interstate Commerce Act are either collaterally involved or referred to in the opinion of the Circuit Court of Appeals: Section 1, par. 3, (41 Stat. 474, 49 U.S.C. § 1 (3)); Section 1, par. 10, 11, 13 and 14 (41 Stat. 476, 49 U.S.C. § 1 (10), (11), (13) and (14)); Section 6, par. 1 (34 Stat. 586, 49 U.S.C. § 6 (1f)); Section 15, par. 13 (36 Stat. 553, 49 U.S.C. § 15 (13)). Pertinent provisions of these statutes are reproduced in the Appendix (pp. i-v, *infra*).

### QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred:

1. In failing to hold that the owner of railroad freight cars leased to a shipper for the transportation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars, in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage or discrimination in respect to its shipments, in violation of the provisions of said Act.

- (a) In holding that a "profit" obtained by a shipper-lessee of privately owned cars, represented by

the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, does not constitute a rebate prohibited by the Elkins Act.

(b) In holding that under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were payable to the shipper-lessee.

(c) In holding that a car owner, "as agent", is legally obligated to pay over to its principal, the shipper-lessee, and that the latter may lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, even though a "profit" is thereby realized by the shipper-lessee.

2. In holding that the car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars, and failed to sustain that burden.

3. In failing to hold that the full performance of the contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, and that for that reason the enforcement of the contract must yield to the enforcement of the Act.

# REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(a) In holding that the Elkins Act is not violated through the payment by a car owner to a shipper of the full amount of the car mileage payments received by the car owner from the rail carriers for the use of cars in the transportation of the shipper's property in interstate commerce, notwithstanding that such car mileage payments may exceed the car rental and other expense incurred by the shipper in connection with the use of such cars, and in holding that the "profit" thereby obtained by the shipper-lessee "does not constitute a rebate prohibited by the Act", the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(b) In holding that, under the car mileage tariffs of the rail carriers, the car mileage allowances were payable to the shipper-lessee, although under the rules of the applicable tariffs shown of record (R. 191-198) such car mileage allowances were not payable to such shipper-lessee, the Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court holding that the rules contained in published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 637-8; *Davis v. Cornwell*, 264 U. S. 560, 562; *Eric R. R. Co. v. Stone*, 244 U. S. 332, 335-336; *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50.)

(c) In requiring the full performance of a contractual undertaking notwithstanding that such performance will produce results offending against the terms and purpose of

a federal statute, viz., the Elkins Act, the decision is in conflict on principle with applicable decisions of this Court. (*Armour Packing Co. v. U. S.*, 209 U. S. 56; *U. S. v. Union Stockyard & Transit Co.*, 226 U. S. 286.) The decision is also directly in conflict with the consensus of pertinent authority, represented by decisions of other federal courts and of the Interstate Commerce Commission. (*I. C. C. v. Reichmann*, 145 Fed. 235; *Spencer Kellogg & Sons v. U. S.*, 20 Fed.(2d) 459; *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323.)

(d) It is stated in the opinion of the Circuit Court of Appeals that the case is one of "novel impression" (R. 307). While it is petitioner's view that the issue here presented is controlled by decisions of this Court which are applicable in principle and which should have been followed, nevertheless, if the Circuit Court of Appeals is right in treating the case as one of first impression, a cogent additional reason is afforded for the exercise of the supervisory power of this Court. The Circuit Court of Appeals appears to anticipate a ruling by this Court, as evidenced by the following sentence of its opinion:

"Whether under the new district court rules the complaint could be amended and a new trial had, we leave to the lower court, if the Supreme Court should not agree with our decision on the Car Corporation's third contention, which otherwise disposes of the case." (Emphasis supplied.) (R. 311.)

The "third contention" here referred to is the central issue in the case, viz., the validity of the defense pleaded under the Elkins Act. An authoritative determination of that

issue is of present and nationwide moment, lest erroneous doctrine find temporary and harmful acceptance.

The questions are of importance for the reason that, if the decision of the Circuit Court of Appeals shall become final, it will produce a reversion to subversive practices which the federal courts and the Interstate Commerce Commission alike have condemned as violative of the prohibitions of the Elkins Act. Specifically, it will sanction arrangements between car owning companies and shippers whereby the latter will become the lessees of privately owned cars under circumstances which will permit them to secure monetary profits through the use of the leased cars. Such monetary profits, derived from the mileage payments made by the carriers for the use of the privately owned cars so leased, will enable the shippers to obtain transportation of their property in interstate commerce at less than the published freight rates, in violation of the Elkins Act. The terms of the arrangements between the several car owning companies and the shippers may vary widely depending upon the exigencies of the car owners and the bargaining powers of the shippers, thereby resulting in undue preference and unjust discrimination between shippers, in violation of the Elkins Act. Privately owned cars will become authorized instruments of rebating, unjust discrimination and unlawful preference. The efforts of the Interstate Commerce Commission, as the administrative body charged with the enforcement of the provisions of the Interstate Commerce Act and the Elkins Act, to prevent unlawful rebating and discrimination will be largely frustrated.

Many thousands of privately owned cars are accepted and used by the rail carriers for the transportation of property in interstate commerce throughout the United States. Compensation is paid by the rail carriers for the private cars so employed. In view of the conflicting interpretations of the Elkins Act by the Circuit Court of Appeals and the Interstate Commerce Commission, respectively, and of the duties of your petitioner and the respondent thereunder, it is important that rail carriers, car owners and shippers be authoritatively advised by a decision of this Court as to the terms, respecting compensation, under which such privately owned cars may be used for the transportation of property in interstate commerce. In its practical effect, the decision of the Circuit Court of Appeals reverses the decision reached by the Commission in the course of its efforts to eliminate unlawful practices in the use of private cars. It should be determined, therefore, whether the conclusions and admonitions of the Commission are to be heeded by car owning companies and their shipper-lessees, in view of possible prosecutions for violation of the Act, or whether they may safely be disregarded in reliance upon the contrary conclusions of the Circuit Court of Appeals. In particular it is important that it be authoritatively decided

(1) Whether a shipper-lessee may receive, through a car owner or otherwise, the full amount of the car mileage payments made by the rail carriers for the use of such cars, even though such car mileage payments are in excess of the car rental and other costs, if any, incurred by the shipper-lessee in connection with the employment of such cars;

(2) Whether a profit received by a shipper-lessee, represented by the excess of car mileage payments made by the rail carriers, for the use of privately owned cars, above the car rental and other expense incurred by such shipper-lessee under lease or other arrangement with a car owner, is a rebate or concession prohibited by the Elkins Act.

This Court has repeatedly declared that private contract rights must yield to the public welfare where the latter is appropriately declared and the two conflict. In particular this Court has refused to require or permit the performance of a contractual obligation which offends against the provisions of the Elkins Act (*Armour Packing Co. v. U. S.*, *supra*; *U. S. v. Union Stockyard & Transit Co.*, *supra*). In disregard of these principles, the decision here sought to be reviewed would enforce private contract rights which conflict with the prohibitions of the Elkins Act.

The novel and erroneous rule laid down by the Circuit Court of Appeals should not be permitted to stand as a guide for the future.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket No. 8799. *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corporation, a corporation, Appellee*, and that the said judgment of the Circuit Court of Appeals

for the Ninth Circuit may be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem proper.

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*Of Counsel.*

Dated at San Francisco, California

June 15, 1939.

# In the Supreme Court of the United States

October Term, 1939.

No. \_\_\_\_\_

GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

## Brief in Support of Petition for Writ of Certiorari.

References to the opinions below are supplied in the  
Petition (p. 8).

A statement of the case has been given in the Petition  
(pp. 2-8) and to avoid duplication is not repeated.

### SPECIFICATIONS OF ERROR.

The errors intended to be urged are those specified in the  
accompanying Petition and numbered 1 to 3 inclusive  
(pp. 9-10), the same being assigned as errors.

## SUMMARY OF ARGUMENT.

1. The owner of railroad freight cars leased to a shipper for the transportation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars, in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage of discrimination in respect to its shipments, in violation of the provisions of said Act.

(a) A "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, constitutes a rebate prohibited by the Elkins Act.

(b) Under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were not payable to the shipper-lessee.

(c) A car owner, "as agent", is not legally permitted to pay over to a shipper-lessee, as principal, and the latter may not lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, when a "profit" is thereby realized by the shipper-lessee.

2. The car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the

shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was not required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars. The burden was in any event sustained.

3. When the full performance of a contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act.

## ARGUMENT

### I.

THE OWNER OF RAILROAD FREIGHT CARS LEASED TO A SHIPPER FOR THE TRANSPORTATION OF THE LATTER'S PROPERTY IN INTERSTATE COMMERCE BY RAILROAD IS PROHIBITED BY LAW, AND PARTICULARLY BY THE PROVISIONS OF THE ELKINS ACT, FROM PAYING OVER TO THE SHIPPER ANY PART OF THE CAR MILEAGE PAYMENTS RECEIVED BY THE CAR OWNER FROM THE RAIL CARRIERS, AS COMPENSATION FOR THE USE OF SUCH CARS, IN EXCESS OF THE SHIPPER'S CAR RENTAL AND OTHER COSTS, IF ANY, IN THAT THEREBY THE SHIPPER WOULD OBTAIN A REBATE OR CONCESSION AND AN ADVANTAGE OR DISCRIMINATION IN RESPECT TO ITS SHIPMENTS, IN VIOLATION OF THE PROVISIONS OF SAID ACT.

#### A. The Shipper's "Profit" as a Rebate.

The holding of the Circuit Court of Appeals to which the petitioner's challenge is particularly directed is cast in the following terms:

"(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. *Such profit does not constitute a rebate prohibited by the Act.*" (Opinion, R. 311) (Emphasis supplied.)

This declaration is without precedent or counterpart in the history of common carrier regulation. It is hostile to ruling principles repeatedly announced and enforced. In its specific application to the use of privately owned cars, it is opposed to every other ruling within petitioner's knowledge. Never heretofore has it been held or implied that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of the car mileage revenue over the costs incurred by the shipper in obtaining and using the cars.<sup>1</sup>

It has been noted in the Petition (p. 10, supra) that the Circuit Court of Appeals further held that the Car Corporation failed to prove that the El Dorado Company

(1) The court has erred in its premises as well as in its declaration of principle. As shown hereafter, under "B" of this subdivision, failure of the rail carriers to pay the car mileage earnings to the El Dorado Company would not be "a criminal offense" under the Elkins Act, since under the provisions of the car mileage tariffs the mileage earnings were not payable to the El Dorado Company. Moreover, the car mileage rates are not based upon average costs of "shipper-suppliers," as understood by the court. They are based wholly upon the costs of car owners, and in no part upon the costs of lessees of such cars. (*In the Matter of Private Cars*, 50 I.C.C. 652, 682).

had incurred no costs, additional to rental, in the use of leased cars. That conclusion will be separately considered hereafter. But the ruling immediately criticized is without limit or qualification. It goes the full length of declaring that irrespective of the shipper's costs, and alike irrespective of the "profit" measured by the excess of the car mileage payments above costs, such "profit" rightly inures to the shipper as the legitimate fruit of his favorable lease. According to the court, it is not to be viewed as an indirect rebate or concession.

The cases heretofore decided on similar or cognate issues have reached directly contrary results.

(1) Use of private car as a means of rebating or discrimination.

As recited in the preceding Petition (pp. 4-5), the Car Corporation regularly credited the El Dorado Company with the full amount of the car mileage received from the rail carriers for the use of the leased cars, and paid over the excess of such receipts above the car rental, until the announcement of the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (July 2, 1934). In view of the conclusions reached by the Commission in that case, plainly admonishing shippers, car owners and carriers alike as to the requirements of law, the Car Corporation modified its practice under the agreement of lease. Thereafter it credited the El Dorado Company with the car mileage payments in amounts equal to but not exceeding the car rental, deeming that to pay over the excess would subject both parties to charges of violation of the Elkins Act (Stipulation R. 45, 48). The El Dorado Company still

paid no car rental in fact, since its rental was offset by the credit of car mileage in equal amount (R. 172).

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars.<sup>1</sup> In its annual report for the year 1906 (p. 48) the Commission commented with satisfaction upon the decision of the United States Circuit Court in *I. C. C. v. Reichmann*, 145 Fed. 235, holding that a private car company which furnishes its cars to the rail carriers for the use of shippers "is within the provisions of the Elkins Law." Further summarizing this decision the Commission said:

(1) The Commission's annual reports to Congress, commencing with its Third Annual Report for the year 1889, clearly disclose its continuing concern with the private car problem (Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48). In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evils Resulting from the Use of Private Cars*" (p. 22 et seq.). Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*: "it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, a practice which operated to the same effect as the payment of rebates to such shippers \* \* \*". (p. 24.) (Emphasis supplied.)

"The giving by such a car company of any rebate to a shipper using its cars is a violation of such statute. Such a car company is therefore subject to the jurisdiction of this Commission when inquiring into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates. (145 Fed. Rep. 235)"

The efforts of the Commission to eliminate improper and wasteful practices in the use of privately owned cars culminated in a general investigation, nation-wide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars" (R. 55). For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled "*Use of Privately Owned Refrigerator Cars*" (R. 49, 55). The extended hearings and investigations thereupon conducted by the Commission eventuated in the report and decision which brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage to the El Dorado Company.

The complete text of the Commission's report and order is in the record, by stipulation of the parties (R. 48, 49-162). It is in the record not only for the Commission's conclusions as to the requirements of law, but also for the findings of fact which served as the foundation for those conclusions. The following excerpts from the Commission's report exemplify the prevailing practices as well as their objectionable consequences and serve also to re-

veal the cogent reasons which led the Commission to condemn the payment of car mileage allowances to shippers in excess of car rental and any incidental expense:

"The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers." (R. 59)

"The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers. The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and the mileage earnings usually exceed the compensation paid the car owners by substantial amounts." (R. 60) (Emphasis supplied.)

In its findings and conclusions the Commission said, *inter alia*:

"We further find . . . that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through

car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; \* \* \* (R. 160)

The Commission said further:

"The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but *the general principles enunciated apply equally to all other types of private cars.*" (R. 159) (Emphasis supplied.)

The significance and importance of the Commission's conclusions are obvious. Plainly the Car Corporation could not ignore these declarations except at the peril of disciplinary action at the instance of the Commission.<sup>1</sup> It undertook to bring its practices into conformity with the requirements of law as declared by the Commission. One private car owning company disregarded the admonitions of the Commission and was indicted for violation of the Elkins Act by reason of an arrangement whereby a shipper-lessee received car mileage in excess of its car rental.

*U. S. v. North Western Refrigerator Line Co., U. S. D. C. Northern Dist. of Ill. No. 29048; indictment returned June 13, 1935.*

(1) It is stated in the opinion of the Circuit Court of Appeals that "The Car Corporation relies on a statement of the Commission in the Refrigerator Car case \* \* \* (R. 327) This statement is inadequate. It has been made plain throughout that the Car Corporation relies upon all of the pertinent findings and conclusions of the Commission in that case.

The brief of the United States Government in opposition to defendant's demurrer and motion to quash in the latter case was brought to the attention of the Circuit Court of Appeals. It is this brief to which the court refers curtly in its opinion as "the brief of a district attorney on a demurrer to an indictment" (R. 326).

The statement of the Commission that the principles set forth in its report are applicable to "all other types of private cars" is dismissed by the Circuit Court of Appeals as "dictum" (R. 344). If such characterization is technically warranted, it should at least be recognized that the admonitions of an experienced administrative body charged with the enforcement of the Elkins Act and related statutes are persuasive and worthy of respect. The Circuit Court of Appeals has given them no weight whatever.

The conclusions of the Circuit Court of Appeals are wholly irreconcilable with the conclusions of the Commission. In effect, the Court has overruled the Commission. If the decision is permitted to stand it will not only discredit the Commission's views but it may well nullify the Commission's efforts to put an end to rebating and discrimination in connection with the use of privately owned cars.

In the course of its report in *Use of Privately Owned Refrigerator Cars* the Commission cited and relied upon the decision of the United States Circuit Court in

*Interstate Commerce Commission v. Reichmann*,  
supra, (R. 151-154).

In that case issue was raised as to the legality of arrangements between a car owner and shippers whereby

the shippers received part of the car mileage payments made by the rail carriers to the car owner as compensation for the use of the cars. The Circuit Court there held that the prohibitions of the Elkins Act extend to "any person, persons or corporation," thereby embracing private car owning companies, and that the payment of car mileage revenue by the car owner to the shipper would violate the Elkins Act in that it "would operate to give the fortunate payee an advantage by reducing his freight account below the regular rate \* \* \*" (pp. 240-241). The court said further that "The net cost of the transaction to him—his freight expense—has been reduced just that much" (p. 237).

(2) Principle unaffected by 1906 and 1917 amendments.

The Circuit Court of Appeals in the instant cause concludes that the ruling in the *Reichmann* case is no longer applicable for the reason that the case "was decided in 1906, shortly before the Hepburn amendment and 11 years before the car service amendment of 1917 \* \* \*" (R. 326). But the court is in error as to the effect of both amendments. By the 1906 amendment to Section 15 of the Interstate Commerce Act (Hepburn Amendment) it is provided in brief that "If" the owner of property furnishes any instrument of transportation "the charge and allowance therefor shall be no more than is just and reasonable" and the Commission is empowered to "determine what is a reasonable charge as the maximum to be paid by the carrier or carriers \* \* \* and fix the same by appropriate order \* \* \*". (34 Stat. 590, 36 Stat. 553-554; 49 U.S.C. §15(13); Appendix p. v.) Such was the sole purpose of the amendment. It was wholly restrictive. The amend-

ment has not conferred upon shippers the right "to supply their carriers with the facilities necessary for the transportation of their products," as the Circuit Court of Appeals has erroneously concluded (R. 312, 326). The carriers still retain the right to furnish their own vehicles for the transportation of freight.

*Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 232 U. S. 199, 214, 215.

The Car Service Amendment of 1917 (40 Stat. 101, 41 Stat. 476; 49 U.S.C. §1(10), (11), (13) and (14); Appendix pp. iii, iv) served to broaden the authority of the Commission, but it had neither the purpose nor effect suggested in the opinion of the Circuit Court of Appeals. In particular it did not give the Commission authority over the rates of compensation paid by the carriers to all "car-suppliers". In a very recent decision in I. & S. Docket No. 4572, *Refrigerator Car Mileage Allowances* (decided April 27, 1939), the Commission has held that this amendment confers jurisdiction over practices in respect to car service "as between the carriers only".

Neither the 1906 nor the 1917 amendment served to legalize any practice which theretofore had been held to be in violation of the Elkins Act. It remained and still remains the law that a privately owned car may be used, with the carrier's consent, in interstate commerce, but it may not be used as a means of rebating, discrimination or preference.<sup>1</sup>

(1) The Circuit Court of Appeals seeks further to distinguish the *Reichmann* case on the ground that "Though purporting to construe the Elkins Act, it does not consider

(3) Rebates or concessions through intervening third persons.

The Commission also cited and relied upon the decision of the Circuit Court of Appeals for the Second Circuit in

*Spencer Kellogg & Sons v. U. S.*, 20 Fed.(2d) 459, certiorari denied 275 U. S. 566. (R. 155)

There a rebate or concession was accomplished through the payment by an elevator company to a shipper of a portion of the allowance made by the rail carrier for the elevation of grain in transit from water to rail. The payment was held to be in violation of the Elkins Act, irrespective of the fact that the elevator company was not a common carrier but an intervening third person.

The service of elevation in transit and the provision of private cars are comprehended by a single sentence of Section 1 of the Interstate Commerce Act, which provides that the term "transportation" shall include "cars, and other vehicles \* \* \* irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit \* \* \* of property transported." (24 Stat. 379, 41 Stat. 474-475; 49 U.S.C. §1(3); Appendix p. ii.)

its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps because no such car supplying tariff was in existence." (R. 326-7) (For 2d par. of Elkins Act, see Appendix, p. ii.) In reply it will suffice to observe that no deviation from the car mileage tariffs is involved in the instant case. The car mileage was not payable to the El Dorado Company under the provisions of the carriers' published tariffs, as is shown under "B" of this subdivision.

The two cases just reviewed are indistinguishable on principle from the instant case. The cases are in parallel in all essential features. In each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain an advantage.

#### B. Circuit Court's Erroneous Understanding of Car Mileage Tariffs.

This suit was not brought to enforce the provisions of the rail carriers' car mileage tariffs. Rather it is a suit to recover upon a contract between a shipper and a car owning company. Nevertheless, the Circuit Court of Appeals has given extended consideration to the car mileage tariffs and has rested its decision largely upon a mistaken understanding of the tariff provisions and their effect. It has upheld the shipper's right of recovery primarily upon the ground that under the applicable tariffs of the rail carriers the car mileage allowances were payable to such shipper (R. 329).<sup>1</sup> The tariff provisions are in the record and do not so provide (R. 191-198).

The error of the court in interpreting the tariffs and purporting to enforce them was drawn to its attention in the petition for rehearing. Thereupon the court de-

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(1) In this connection the court devoted a substantial portion of its opinion to the thesis that it would be a crime under the second paragraph of the Elkins Act (Appendix, p. ii) for the rail carriers to refuse payment of car mileage in conformity with the provisions of the published tariffs (R. 311, 323, 324, 328).

clared, in its supplementary opinion, that "*we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company*" (R. 346). (Emphasis supplied.) Such assumption is not only without justification of record but is contrary to the records.

The applicable rules of the car mileage tariffs setting forth the terms and conditions upon which the mileage allowances would be paid are in the record as plaintiff's Exhibit No. 3 (R. 191-198) and are specifically identified by stipulation of counsel (R. 191).<sup>1</sup> Throughout the first fifteen months of the period covered by the suit, these tariff rules provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars "as shown by the permanent reporting marks" (R. 192-197). The "reporting marks" borne by the leased cars were *not* those of the El Dorado Company, but were those of the Car Corporation (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause forbidding payment to a lessee such as the El Dorado Company. The clause reads:

"Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee* \* \* \*" (R. 197). (Emphasis supplied.)

The meaning of these words is not open to controversy.

(1) In its assignment of errors the El Dorado Company identified these rules as the "applicable published railroad tariffs" (R. 223, 235).

The Circuit Court of Appeals has erroneously understood that these tariff rules are merely "rules" of the American Railway Association (R. 347). The court has failed to understand that these "*Association rules*" are the *actual tariff rules* published and filed with the Commission in behalf of all the rail carriers by "American Railway Association Tariff Bureau, B. T. Jones, Agent" (R. 192). In holding that under the applicable tariffs the car mileage allowances were payable to the El Dorado Company, the Circuit Court of Appeals has in fact disregarded the provisions of these applicable tariffs specifically governing the payment of the car mileage allowances. Its decision is in conflict with decisions of this Court which have uniformly held that the rules contained in the published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 637-638; *Davis v. Cornwell*, 264 U. S. 560, 562; *Erie R. R. Co. v. Stone*, 244 U. S. 332, 335-336; and see *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50.)<sup>1</sup>

### C. Respondent's "Agency" Theory.

Counsel for the El Dorado Company evolved a theory of "agency" to implement the demand for payment of the car mileage revenue in full. The contention is that

(1) In the opinion upon petition for rehearing the court for the first time criticizes the answer of the Car Corporation because it "does not allege the *absence* of a tariff compensating the El Dorado Company" (R. 346). (Emphasis supplied). This criticism seems especially unwarranted since the parties *stipulated* as to the applicable tariffs.

the Car Corporation made itself the "agent" for the collection of the car mileage revenue for its principal the El Dorado Company, and hence that it must pay over the car mileage revenue in full to the El Dorado Company. This theory was adopted by the Circuit Court of Appeals (R. 304, 305, 306).

We think that agency relations were not created, but, if it is to be assumed that an agency did arise, it can contribute nothing to the case for the El Dorado Company. Manifestly, a principal can recover through his agent only that which is lawfully payable to the principal. In the preceding subdivision it has been shown that, under the provisions of the applicable car mileage tariffs, the car mileage revenue was not payable to the El Dorado Company. Hence the El Dorado Company could not recover the revenue upon the theory of agency.

The argument is beside the point in any event. If it were possible to conceive of an agency agreement whereby a shipper is to obtain, through an intervening car owning company, payments from the rail carriers amounting to a partial remission of freight charges, the agreement would be unenforceable. It is obvious that, if the rule were otherwise, the statute could readily be circumvented by the convenient device of designating the car owning companies as the "Agents" through whom car mileage payments could be made to the shippers in violation of the published freight rates and the purposes of the law.

The Elkins Act is a remedial statute which broadly comprehends all manner of arrangements, direct or indirect, whereby property is "transported at a less rate

than that named in the tariffs published and filed by such carrier \* \* \* or whereby any other advantage is given or discrimination is practiced. (U. S. v. Koenig Coal Co., 270 U. S. 512, 518, 519).

The means employed is immaterial. The device may "not be necessarily fraudulent". Unlawful intent is not a necessary ingredient of the offense. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 71, 72).

The decision in the instant case stands alone in upholding practices which in fact result in the transportation of property at less than the lawfully established tariff freight rates, constituting rebating, and in addition will inevitably result in inequalities and preferences among shippers.

## II.

THE CAR OWNER, DEFENDING ITS REFUSAL TO PAY OVER TO A SHIPPER-LESSEE THE EXCESS OF THE CAR MILEAGE PAYMENTS RECEIVED FROM THE RAIL CARRIERS ABOVE THE AMOUNT OF THE SHIPPER'S CAR RENTAL UPON THE GROUND THAT THE PAYMENT OF SUCH EXCESS WOULD VIOLATE THE ELKINS ACT, WAS NOT REQUIRED TO PLEAD AND PROVE THAT SUCH SHIPPER HAD INCURRED NO EXPENSE IN ADDITION TO THE CAR RENTAL IN CONNECTION WITH THE USE OF THE LEASED CARS. THE BURDEN WAS IN ANY EVENT SUSTAINED.

Although the point was neither raised nor presented either in the District Court or upon appeal, the Circuit Court of Appeals has held that the burden was upon the Car Corporation to prove that the El Dorado Company

had incurred no expense, additional to the car rental, in connection with the use of the leased cars. It has further held that that burden was not discharged. (R. 308, 311). In its opinion upon petition for rehearing the court has suggested, for the first time, that defendant's pleading was inadequate in this regard. (R. 343-345.) Neither point was properly before the court for decision.

**A. Theory of Decision at Variance With Theory Upon Which Case Was Tried and Decided. Assumption of Facts Not in Evidence.**

The record reveals no costs or expenses, other than car rental, incurred by the El Dorado Company in connection with the use of the cars. The entire account between the parties is in evidence as plaintiff's Exhibit No. 1 and shows no debits to the El Dorado Company other than car rental (R. 182, 183-187, inclusive). The stipulation as to facts is silent respecting any other costs or expense (R. 45). Neither in its proposed findings (R. 203-206, inclusive) nor in its assignment of errors (R. 225-286, inclusive) has the El Dorado Company advanced any claim that cost or expense in addition to the car rental was incurred. In fact, both parties presented the case in the District Court as well as in the Circuit Court of Appeals upon the basis that the car rental was the only cost to the El Dorado Company. The case was decided by the District Court upon that basis. Under well settled principles the parties could not, and they did not, adopt a different theory of the case in the Circuit Court of Appeals. Neither party will be heard in an appellate court to question facts whose existence was assumed without objection in the trial court and on which assump-

tion the trial court proceeded without objection in deciding the case. (*U. S. v. Atkinson*, 297 U. S. 157, 159-160; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206-207; *McCandless v. Furlaud*, 293 U. S. 67, 74; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306; *Brown v. Gurney*, 201 U. S. 184, 190; *Panama City v. Federal Reserve Bank of Atlanta*, (C. C. A. 5th) 97 Fed.(2d) 499, 500; *Boray v. Fuller*, (C. C. A. 8th) 63 Fed.(2d) 280, 284; *Sacramento Suburban Fruit Lands Co. v. Melin*, (C. C. A. 9th) 36 Fed.(2d) 907, 909; *Arkansas Anthracite Coal & Land Co. v. Stokes* (C. C. A. 8th) 2 Fed.(2d) 511, 515.)

No issue as to additional costs, either actual or conjectural, was ever suggested until the Circuit Court of Appeals, upon its own initiative, raised it in its opinion (R. 308). The court, and not the El Dorado Company, tenders the suggestion that the monthly rentals did not establish the El Dorado Company's costs. The court, and not the El Dorado Company, argues that the Car Corporation had the burden of proof and failed to meet it. In support of its conclusion that the car rental did not establish the El Dorado Company's costs, the court offers a purely speculative analysis of costs and "possible liabilities" to which the El Dorado Company might have been subject (R. 310). None of these hypothetical costs has record support and in some important respects they are demonstrably contrary to fact.<sup>1</sup>

(1) For example: (1) The court assumes that the El Dorado Company "must provide trackage facilities" for the storage and switching of the cars (R. 310). This is without support in the contract or otherwise in the record. (2) The court says that the El Dorado Company "has the current cost of their administration" (i. e., of the cars)

If a party may not upon appeal change its theory of the case, it must logically follow that the Circuit Court of Appeals is not free to formulate a new theory of the case, and, in doing so, to assume a state of facts for which there is no support in the record. This must particularly be so where the court proceeds to assume facts which are at variance with what was presented to the trial court. The fact is that the Circuit Court of Appeals has here reversed the trial court on a point not ruled upon or submitted for ruling, or even assigned as error. It is wholly unfair to the District Court to hold it guilty of error in a

(R. 310). If this is a reference to maintenance and repairs, it will suffice to point out that the Car Corporation is expressly obligated by the contract to maintain and repair the cars (R. 24-25). (3) The court states that the El Dorado Company "has the cost of cleaning the cars" (R. 310). The record does not so indicate. (4) The court says, contrary to the fact, that the cocoanut oil is "both inflammable and explosive and the contents may destroy the cars" (R. 310). (5) The court raises the possibility that the plant might suspend operation during the remainder of the lease so that the "rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease" (R. 311). Yet testimony given by an officer of the El Dorado Company at the trial, two months before the expiration of the lease, was to the effect that since the middle of 1934 the Car Corporation had continued to credit the El Dorado Company with a sufficient amount of the mileage earnings to offset all rental costs (R. 172).

A purely conjectural analysis of "possible" costs and liabilities of this variety, many of which are directly contrary to the record, is patently unwarranted.

ruling which it never made.<sup>1</sup> (*Commercial National Bank v. Reber*, (C. C. A. 3rd) 74 Fed.(2d) 301, 302.)

**B. The Car Corporation's Burden of Proof Fully Discharged.**

The record shows that the car mileage earnings were more than double the car rental during the period from January 1, 1934, to May 31, 1935, inclusive, the excess amounting to more than \$25,000 (Statement of facts, Petition, page 6). While the record does not show the amount by which the mileage earnings exceeded the rental during the remainder of the three-year period covered by the lease, it does show that at the time of the trial, two months before the expiration of the lease, the Car Corporation, although retaining the excess mileage earnings, had since "the middle of the year 1934" credited to the rental account of the El Dorado Company "such proceeds of the mileage earnings as were equal to the rental", so that the El Dorado Company had actually paid nothing by way of rental during the entire period of the lease up to the time of trial (R. 172).<sup>2</sup> The record also shows that the cost of maintenance and repair of the cars was to be borne by the Car Corporation and not by the El Dorado Company (R. 24, 177). The only reasonable in-

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(1) In *McCandless v. Furlaud*, supra, it was held that the circuit court of appeals had erred in reversing a judgment upon a point which, although assigned as error, had not been presented to the trial court. This Court said:

"The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court." (293 U.S. at p. 74.)

(2) This testimony was overlooked by the Circuit Court of Appeals. See subd. (5) of Note (1), supra, pp. 36-37.

ference to be drawn from these facts in the absence of any other evidence is that the car mileage earnings were substantially in excess of the car rental and any other "actual expenses" which might conceivably have been incurred by the El Dorado Company and that the payment of this excess to the El Dorado Company, therefore, would accomplish an unlawful rebate.

The payment by a car owner to a shipper-lessee of car mileage earnings so greatly in excess of car rental cannot be justified upon the merely speculative assumption that the lessee might have incurred, or might in the future incur, additional costs equal to the amount of such earnings. Even in a criminal prosecution for unlawful rebating in violation of the Elkins Act, the government is not required to offer proof excluding possibilities of such a remote character. (*Vandalia R. Co. v. U. S.*, (C. C. A. 7th) 226 Fed. 713, 717; certiorari denied, 239 U. S. 642.) Yet such is the burden which the views expressed in the opinion of the Circuit Court of Appeals would impose upon the Car Corporation.

If the El Dorado Company had incurred any costs or expense additional to car rental, the facts were within its knowledge. They were not within the knowledge of the Car Corporation. In such a case, where there is proof of circumstances tending to support the contention of the party having the burden of proof, the other party, who is in a position to offer evidence of all the facts and circumstances as they existed, must produce such evidence. If he fails to do so, it must be concluded that the facts do not support his cause. (*Selma, Rome & Dalton R. R. Co. v. U. S.*, 139 U. S. 560, 567-568; *Graves v. U. S.*,

150 U. S. 118, 120-121; *Runkle v. Burnham*, 153 U. S. 216, 225; *U. S. v. Denver & R. G. R. R. Co.*, 191 U. S. 84, 91-93; *Henderson v. Richardson Co.*, (C. C. A. 4th) 25 Fed. (2d) 225, 228; *American Lead Pencil Co. v. Gottlieb & Sons*, 181 Fed. 178, 181; *Kyle v. Wadley*, 24 F. Supp. 884, 886.) Since the El Dorado Company offered neither claim nor proof of any additional costs, the Circuit Court of Appeals erred in concluding that the Car Corporation failed to sustain its burden of proof.

### C. Defense Adequately Pleaded.

The adequacy of petitioner's plea in defense, based upon the Elkins Act, was likewise at no time questioned by the El Dorado Company either in the trial court or upon appeal. Upon its own initiative the Circuit Court of Appeals has questioned the adequacy of the plea, and has done so only in its opinion upon petition for rehearing (R. 344). Even if the court could properly initiate this point, it is plain that the plea was adequate. This Court has held that even in an indictment under the Elkins Act it is sufficient to plead the offense in the language of the statute and that such pleading is good, at least in the absence of demurrer (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 83-84; and see *U. S. v. Chicago St. P. and O. Ry. Co.*, 151 Fed. 84, 86, aff'd 162 Fed. 835, cert. den. 212 U. S. 579).

In pleading its defense the Car Corporation averred that if it should pay over to the El Dorado Company "any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agree-

ment, such credit and payment would be unlawful in that \* \* \* (the El Dorado Company) \* \* \* *would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation,* thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). (Emphasis supplied.) This served fully to acquaint the adversary and the court with the nature of the defense relied upon.

The plea of the Car Corporation thus properly set forth the ultimate fact that, by the payment of any part of the excess car mileage earnings, the El Dorado Company would secure transportation of its property at less than the tariff rates.

### III.

**WHEN THE PERFORMANCE OF A CONTRACTUAL UNDERTAKING IS FOUND TO BE IN CONFLICT WITH THE ELKINS ACT, THE ENFORCEMENT OF THE CONTRACT MUST YIELD TO THE ENFORCEMENT OF THE ACT.**

It is elementary that a contractual obligation will not be enforced by the courts if thereby the law would be violated. (*Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 375; *Hudson County Water Company v. McCarter*, 209 U. S. 349, 357.)

It has been made particularly clear by this Court that when the provisions of a contract offend against the

(1) While the Circuit Court of Appeals in its opinion upon petition for rehearing sets forth a part of the Car Corporation's plea, it has omitted that portion which is italicized above (R. 344).

terms and purpose of the Elkins Act, the enforcement of the contract should be enjoined.

*United States v. Union Stockyard & Transit Co.*,  
226 U. S. 286, 309.

(See also *New York, New Haven & Hartford R. R. v. I. C. C.*, 200 U. S. 361, 402; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 81-82; *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 474.)

The effect of the decision of the Circuit Court of Appeals in the instant cause is to enforce a contractual undertaking on the part of a car owning company to a shipper-lessee notwithstanding that the shipper-lessee will thereby secure a "monetary profit" from the employment of the cars in the transportation of its property and that such monetary profit is a *pro tanto* abatement or remission of the shipper's freight charges. While in words the Circuit Court of Appeals does not so declare, such are the necessary consequences of its ruling.

By its decision herein the Circuit Court of Appeals would set no limits upon the results that may be accomplished by contract between a car owning company and a shipper-lessee. The parties may bargain freely as to the amount of the car rental, and with equal freedom as to the disposition of the car mileage payments made by the rail carriers to the car owning company. The resulting profits may be large or small, and they may vary widely as between shippers. Whatever the measure of profit, and however diverse the treatment meted out to different shippers, this decision would require performance in accordance with the strict letter of each con-

tract. Thereby the decision would reverse the rule of law which has heretofore prevailed, and require the statute to yield to the contract.

### CONCLUSION.

The decision of the Circuit Court of Appeals herein is opposed to the entire current of authority. It presents a dangerous conflict with the conclusions maturely reached by the Interstate Commerce Commission as a result of its extensive investigation in *Use of Privately Owned Refrigerator Cars, supra*. If allowed to stand as an authoritative expression of the law, it will afford judicial sanction to the use of privately owned cars as a means by which shippers may avoid the prohibitions of the Elkins Act against rebates, concessions, preference and discrimination.

Respectfully submitted,

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## Appendix

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### STATUTORY PROVISIONS INVOLVED.

Elkins Act, § 1, par. 1 and 2:

"That \* \* \* it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two

years, or both such fine and imprisonment, in the discretion of the court. \* \* \*

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U. S. C. §41(1) and (2).

**Interstate Commerce Act, §1(3):**

"The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act of Feb. 4, 1887, 24 Stat. 379, c. 104, as amended by Act of June 29, 1906, 34 Stat. 584, c. 3591; by Act of June 18, 1910, 36 Stat. 545.

c. 309; by Act of Feb. 28, 1920, 41 Stat. 474, c. 91, and by Act of June 19, 1934, 48 Stat. 1102, c. 652; 49 U. S. C. § 1(3).

**Car Service Amendment of 1917,**

**Interstate Commerce Act, § 1(10), (11), (13) and (14):**

“(10) The term ‘car service’ in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

. . . . .

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, estab-

fish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this part, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices." Act of May 29, 1917, 40 Stat. 101, c. 23, as amended by Act of Feb. 28, 1920, 41 Stat. 476, c. 91; 49 U. S. C. § 1(10), (11), (13) and (14).

**Interstate Commerce Act, § 6(1):**

"That every common carrier<sup>2</sup> subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried; and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any

part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this part." Act of Feb. 4, 1887, 24 Stat. 380, c. 104, as amended by Act of Mar. 2, 1889, 25 Stat. 855, c. 382, by Act of June 29, 1906, 34 Stat. 586, c. 3591, and by Act of Feb. 28, 1920, 41 Stat. 483, c. 91; 49 U. S. C. § 6(1).

**Hepburn Amendment.**

**Interstate Commerce Act, § 15(13):**

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U. S. C. § 15(13).

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**In the Supreme Court of the  
United States**

October Term, 1939.

**No. 129**

**GENERAL AMERICAN TANK CAR CORPORATION,**  
a corporation,

*Petitioner,*

vs.

**EL DORADO TERMINAL COMPANY,**  
a corporation,

*Respondent.*

**Petitioner's Reply  
to**

**Brief for Respondent in Opposition to Petition for  
Writ of Certiorari.**

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August 30, 1939.



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# In the Supreme Court of the United States

October Term, 1939.

No. 129.

GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

## **Petitioner's Reply to Brief for Respondent in Opposition to Petition for Writ of Certiorari.**

### **INTRODUCTORY STATEMENT.**

In the petition and supporting brief it was shown that the decision sought to be reviewed involves an important question of federal law which has not been, but should be, settled by this Court. It was further shown that the decision is in conflict on principle with applicable decisions of this Court and that it is directly antagonistic to the con-

sensus of pertinent authority, represented by decisions of other federal courts and of the Interstate Commerce Commission. It was pointed out that if the decision is allowed to stand it will result

- (1) in frustrating the efforts of the Commission to eliminate objectionable practices in the use of private cars, and
- (2) in giving judicial sanction to the employment of private cars as a means of rebating, discrimination and preference.

Specifically, the decision of the Circuit Court of Appeals goes the full length of holding that a "profit" realized by a shipper-lessee of privately owned railroad tank cars, measured by the excess of the car mileage allowances made by the rail carriers for the use of the cars above the amount of the shipper's car rental and incidental costs, if any, is not a rebate forbidden by the Elkins Act. Irrespective of the shipper's costs, and irrespective alike of the amount of the "profit", the Circuit Court holds that such "profit" rightly inures to the shipper as the legitimate fruit of his favorable arrangement with the car owning company. In no case heretofore has it been so held. Respondent has not challenged, and manifestly it could not challenge, the accuracy of this characterization of the holding of the Circuit Court.

The factual presentation in the petition and supporting brief is not criticized by respondent. Respondent does not deny that the car mileage earnings which accrued on the leased cars during the period covered by the suit were

approximately twice the amount of the shipper's car rental. The car rental provided by the contract was \$27.50 to \$30.00 per car per month and the car mileage earnings were at least twice that sum (Petition, pp. 6-7). Respondent does not, and plainly cannot, represent that the record discloses any costs, other than car rental, in fact incurred by the shipper in the use of the leased cars. Accordingly, respondent is of necessity asserting its right to secure a "profit" amounting to not less than \$27.50 per car per month through its arrangement with the car owning company for the use of privately owned cars for the transportation of its shipments in interstate commerce.

The only issue raised in this case is directed to the legality, under the Elkins Act, of the shipper's profit measured by the excess of the car mileage paid by the rail carriers over the car rental payable by the shipper-lessee. There is no controversy as to the material facts. The parties were agreed, in the trial of the case in the District Court as well as in the presentation to the Circuit Court, that but a single issue of law is involved. In the reply brief filed by appellant (respondent herein) with the Circuit Court it was expressly recognized that "there is but a single issue, and that purely one of law". That issue was raised by the petitioner's plea in defense and is restricted to the legality of payments, by a car owner-lessor to a shipper-lessee, of car mileage allowances received from the rail carriers in amounts exceeding the shipper's car rental.

The issue is of outstanding public importance and properly requires authoritative determination by this Court, to

the end that privately owned cars may not become authorized instruments of rebating and discrimination.

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## I.

**ILLEGALITY OF PAYMENT BY CAR OWNING COMPANY TO SHIPPER-LESSEE OF CAR MILEAGE ALLOWANCES RECEIVED BY CAR OWNING COMPANY FROM RAIL CARRIERS IN AMOUNTS EXCEEDING CAR RENTAL AND INCIDENTAL COSTS, IF ANY, OF SUCH SHIPPER-LESSEE.**

The legal thesis advanced by the petitioner is essentially this:

A car owning company is precluded by the Elkins Act from paying over to a shipper-lessee, and the latter is prohibited from receiving, car mileage payments received by the car owning company from the rail carriers for the use of leased cars in interstate commerce in amounts exceeding the car rental and other costs, if any, of such shipper-lessee, in that thereby the shipper-lessee would obtain a rebate or concession in respect to its shipments.

In the petition and supporting brief we have shown that the position thus taken by the petitioner is responsive to the terms and purpose of the statute, as declared in authoritative cases. It stems from the generic principle that irrespective of form, and irrespective of the means employed, a shipper is not permitted to receive either from the carrier or from an intervening third person any pay-

ment which will have the effect of lowering his transportation costs below the lawfully established tariff charges. By express terms the law subjects all privately owned cars to the provisions of the Act to the same extent as railroad owned cars, plainly forbidding their use in such fashion as to enable shippers or receivers to secure rebates, concessions, preferences or advantages in any form.

We shall refrain from retraversing ground already covered but shall undertake merely to show that respondent has failed to meet the case tendered by the petition. Respondent seeks rather to avoid petitioner's case.

Preliminarily we shall comment briefly upon certain matters of fact.

#### A. Factual Matters.

We have pointed out that respondent has not questioned the petitioner's presentation of the essential facts. We may take it therefore that the accuracy of that presentation is conceded. The petitioner, however, must take exception to the treatment of facts by respondent in respects which may be material.

(1) It is stated upon page 2 of respondent's brief that "the published and filed tariffs of all railroad carriers provided that the railroads would not furnish these tank cars for transportation purposes (R. 163, 167, 201) \* \* \*". This characterization is inaccurate. The apparent implication is that in practice the rail carriers have never furnished shippers with such tank cars (Respondent's brief, p. 11). Such is not the case.

The pertinent tariff item of the rail carriers is in these terms:

"The rates provided for freight in tank cars do not obligate the carriers to furnish tank cars." (R. 201)

While the carriers thus do not "obligate" themselves to furnish tank cars, they do upon occasion supply tank cars to shippers for the transportation of vegetable oils as well as other products, as shown by the record in this case (R. 164-168).

The point in any event is completely irrelevant to the issue presented. The statute expressly provides that all cars "irrespective of ownership or of any contract, express or implied, for the use thereof" are subject to the provisions of the Act, alike with cars of railroad ownership. The fact that the carriers do not obligate themselves to supply tank cars to meet the needs of all shippers can not serve to justify the use of privately owned tank cars as instruments of rebating and discrimination.

(2) Respondent's brief purports to quote language from the car mileage tariffs of the rail carriers providing for a mileage allowance of  $1\frac{1}{2}\text{¢}$  per mile "to the car owner or to the party who has acquired the car or cars" (Respondent's brief, p. 2). The quotation is incomplete and for that reason may give rise to erroneous impressions. Respondent makes a later reference to "certain other requirements set forth in the regulations" (Respondent's brief, p. 17) but omits the text of these "certain other requirements."

Upon reference to the first of the tariff items upon which respondent relies (R. 192) it will be found that the

language reproduced by respondent is followed by the words "as shown by the permanent reporting marks \* \* ". The qualifying terms are material, inasmuch as the tank cars here involved bore the reporting marks of the *car owner* (petitioner herein) and not those of the respondent El Dorado Company. All succeeding tariff items contain language effectively precluding any claim on the part of the respondent El Dorado Company that the car mileage was payable to it under the terms of the tariffs (R. 192-198). Moreover, the tariff item which was in effect after April 1st, 1935, and therefore during the last two months of the period covered by this suit, contained the additional provision that mileage would be paid "only to the car owner—not to a lessee" (R. 197).

• Throughout the entire period covered by this suit the car mileage tariffs of the rail carriers were so phrased as to require payment of car mileage to the Car Corporation (the petitioner) and not to the respondent El Dorado Company. In brief, the El Dorado Company has had no standing at any time to demand payment to it of the car mileage allowances under the applicable terms of the mileage tariffs of the rail carriers. It is wholly misleading for respondent to represent that "there is nothing in the railroad tariffs or rules of the Interstate Commerce Commission preventing such compensation by the rail carrier to the *shipper-supplier* directly" (Respondent's brief, p. 19). The fact is that the railroad tariffs did not sanction such compensation by the rail carrier to the respondent El Dorado Company.

(3) Respondent argues that the record does not show that discrimination among shippers would result from the payment to respondent of the full amount of the car mileage allowances which accrued upon the leased cars. Nevertheless respondent's brief recites that the Car Corporation "had numerous tank cars leased out to other shippers of vegetable oils throughout the whole Pacific Coast" and further suggests that there is nothing to show "that all such shippers did not have contracts with car companies similar to the one sued upon in this case" (Respondent's brief, p. 12). It is plain from these recitals that discrimination among shippers is not only probable but certain if the position of the respondent should be upheld, since it is inconceivable that all shippers would hold contracts from car owning companies upon equally favorable terms and that they would enjoy "profits" in equal measure from the use of the leased cars, thereby assuring a parity in net transportation costs.

But the particular point is again immaterial to the main issue. The question presented is whether a shipper-lessee, as the beneficiary of car mileage payments in excess of his outlay for car rental and other costs, if any, thereby has his transportation costs reduced below the lawful tariff charges, thus receiving a rebate or concession. It would seem clear beyond the possibility of controversy that if the car rental payable by the shipper is \$30 per car per month, but he receives car mileage allowances from the car owning company to the extent of \$60 per car per month, his transportation charges have been reduced in the amount of such excess payment of \$30 per car. Heretofore the cases have so held.

The Elkins Act makes rebating a separate offense and it is therefore immaterial whether discrimination is also shown (*Chicago St. P., M. & O. Ry. Co. v. U. S.* (C.C.A. 8) 162 Fed. 835, 839; certiorari denied, 212 U. S. 579).

(4) Respondent is unable to point to any evidence of record showing that respondent incurred any costs, additional to car rental, in the use of the leased cars. Respondent does not assert that it sustained any such additional costs in fact. Emulating the Circuit Court, respondent is content to suggest, *without the slightest record support*, that "costs and obligations in addition to rental actually did exist" (Respondent's brief, pp. 20, 24).

An effort is made to defend the Circuit Court for having assumed costs even though they are not shown of record. For reply it will suffice again to say that respondent at no time, either in the District Court or in the Circuit Court of Appeals, asserted or claimed costs additional to car rental. The case was presented by both parties upon the basis that car rental was the only cost incurred by the respondent in connection with the use of the leased cars. Respondent does not contend to the contrary even at this time. It does not assert that, either by its assignment of errors or otherwise, it has represented to the Circuit Court that it incurred any costs, other than car rental, in connection with the use of the leased cars. It was not in order for the Circuit Court to indulge in purely speculative assumptions as to "other costs and obligations" which respondent asserts are "matters of common knowledge" (Respondent's brief, p. 23). These were not "matters of common knowledge" and, as pointed out in the brief sup-

porting the petition, they are to a large extent demonstrably contrary to fact (Brief in support of petition, pp. 36-37).

Such other errors of fact in respondent's brief as appear to be of moment will be noticed in the course of the ensuing discussion.

#### B. The Authoritative Cases.

Petitioner has relied upon certain decisions which have always been recognized as authoritative and which cannot be reconciled with the decision here sought to be reviewed. Respondent's brief purports to distinguish these cases. According to our view, the attempted distinctions are wholly abortive.

Respondent repeatedly suggests that the payment of the excess car mileage earnings to respondent is not prohibited by any rule, regulation or order of the Interstate Commerce Commission (Respondent's brief, pp. 6, 7, 9, 11, 13, 17, 19). Thus respondent fails to appreciate or express the real issue. The payments demanded would not be unlawful by virtue of any rule, regulation or order of the Commission; they would be unlawful solely because of the prohibitions of the Elkins Act. In point of fact the Commission has never promulgated any rule, regulation, or order forbidding such payments, either as to refrigerator cars or any other type of equipment. It has merely set forth the requirements of law. The requirements so expressed are not lightly to be disregarded by carriers, car owning companies or shippers.

Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323.

Respondent correctly understands that the petitioner relies definitely upon the report of the Interstate Commerce Commission in the case here cited. The ruling of the Circuit Court in the instant case is in direct hostility to the conclusions of the Commission as to the requirements of the law in the use of privately owned cars. The conflict has been shown in our petition and supporting brief.

Attempting to distinguish, respondent represents that in the *Refrigerator Car case* "The question considered and decided was as to the reasonableness of the allowance paid on refrigerator cars \* \* \* " (Respondent's brief, p. 10). Respondent is in error. The Commission made no decision as to the *reasonableness* of the allowances paid for the use of refrigerator cars, nor did it promulgate any rule or regulation controlling payment of these allowances. But the Commission did find and conclude, *inter alia*, as shown on pages 24 and 25 of the brief supporting the petition, herein, that the payment to shippers "of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates".

The Commission also announced that "the general principles enunciated apply equally to all other types of private cars" (Brief in support of petition, p. 25).

The Commission's investigation was directed mainly to practices in connection with the use of refrigerator cars. The case is important because of its declaration of essential principle, and that principle is simply that privately owned cars may not be used as instruments of rebating, concession or discrimination. Specifically, they may not be so used as to enable a shipper to obtain, through the receipt of car mileage allowances in excess of car rental and other costs, a reduction in tariff charges for the transportation of freight.

Respondent represents further that it appears from the evidence in this case that "the full tariff freight rates were paid to the railroads by the consignees of all the coconut oil shipped by respondent in its leased tank cars" (Respondent's brief, p. 12). This is not a point of distinction. The fact is that shippers of freight in refrigerator cars have paid full tariff freight rates to the rail carriers and yet the Commission has condemned the payment of car mileage to such shippers in amounts exceeding car rental and other costs because such excess payment is in effect a reduction in transportation charges.

Privately owned tank cars are indistinguishable from privately owned refrigerator cars or cars of any other type. The principle announced by the Commission is simply that the privately owned car may not be used as a means by which to accomplish an indirect remission of lawful tariff rates. Respondent fails to recognize the generic character of this principle.

(2) Interstate Commerce Commission v. Reichmann, 145 Fed. 235.

Respondent undertakes to distinguish the decision in the case here cited by stating that the Car Company "rented its cars to the railroads" and that "The railroads furnished them, as it did other cars owned by them, to shippers" (Respondent's brief, p. 14). The attempted ground of distinction is wholly superficial. The substantial fact is that the car owning company was supplying cars under arrangements whereby the shippers received a portion of the car mileage allowances made by the carriers for the use of the cars, thereby indirectly reducing the shippers' transportation costs below the lawful tariff charges. This was the practice condemned by the court as unlawful rebating, forbidden by the Elkins Act. In substance the case here presented is identical, since the shipper is demanding the payment of car mileage allowances, received by the car owning company from the rail carriers, even though such mileage allowances substantially exceed the car rental payable by the shipper. Under the legal principle declared in the *Reichmann* case, as shown in the brief supporting the petition herein, payment of such excess car mileage earnings to the shipper, irrespective of the form of the arrangement, would be in violation of the Elkins Act.

Respondent also refers to the Hepburn Amendment of 1906 to the Interstate Commerce Act and implies that practices of the character held unlawful in the *Reichmann* case have been validated by that amendment (Respondent's brief, p. 15). Respondent has misconceived the purpose and effect of the amendment. It will suffice here to

refer to the discussion on pages 27 and 28 of the brief supporting the petition, wherein it is shown that neither the Hepburn Act nor the 1917 amendment to the Interstate Commerce Act legalized any practice which theretofore had been held to be in violation of the Elkins Act.

(3) *Spencer Kellogg and Sons v. U. S.*, 20 Fed. (2d) 459.

Respondent states that in the case here-cited the payment by the elevator company to a shipper of a portion of the elevation allowance received from the rail carriers for the elevation of grain in transit "was clearly a rebate by an interstate carrier and the Court sustained the conviction on that ground" (Respondent's brief, p. 16). Respondent has misapprehended the holding of the court. It was not held that the payment was "a rebate by an interstate carrier". On the contrary, the court expressly recognized that the elevator company was not a carrier, as shown by the following excerpts from the opinion:

"The writ presents the question of whether a corporation, *other than a carrier* who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates." (p. 460)

"Congress intended to prohibit *all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers.*" (p. 461)

"*The test to be applied in determining whether the act is violated is whether the terms of the statute include the acts committed. Whether the person com.*

mitting the act is a shipper or carrier is not determinative. *United States v. Koenig Coal Co.*, 270 U. S. 512, 46 S. Ct. 392, 70 L. Ed. 709." (p. 461) (Emphasis supplied.)

The foregoing will suffice to show that the prohibitions against rebating are not confined to shippers and carriers only but extend to all persons. As pointed out in the brief supporting the petition (p. 30), the ruling principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device to defeat tariff rates or obtain an advantage.

(4) Cases relied upon by respondent.

Respondent cites the decision of the United States District Court (Judge Bourquin) in *U. S. v. Peterson*, 1 Fed. (2d) 1018. In that case a railroad ticket agent, who had embezzled passenger tickets from the railroad company by which he was employed and had sold the tickets at a reduced price, was indicted for alleged violation of the Interstate Commerce Act and the Elkins Act. The court held that "petty embezzlements and sales of tickets by the carriers' subordinate employees" were not within the terms or intent of the statutes. Assuming the correctness of the ruling, it is clearly irrelevant to the issue here.

Respondent also cites *U. S. v. Durkee Famous Foods, Inc.*, 17 Fed. Supp. 846. In that case a shipper was indicted for receiving an alleged rebate by reason of failure to pay an established tariff rate for the pumping of oil from a barge to railroad cars. The court ruled that the indictment failed to show that the tariff charge for this

service had actually become payable under the rules of the applicable tariffs. The case is not remotely relevant.

Upon pages 8 and 18 of its brief respondent cites four cases, commencing with *U. S. v. Baltimore & Ohio Railroad*, 231 U. S. 274. None of the cases cited is in point, nor does respondent undertake to show wherein they are pertinent. They hold merely that one who supplies a service or facility to rail carriers may receive compensation in conformity with the terms of the applicable tariffs, if the amount paid or received is not unreasonable and if it does not result in discrimination or in a rebate or other concession in violation of the Elkins Act. This principle is not disputed. In none of the cases cited did it appear that payment of the allowance would result, either directly or indirectly, in violation of the Elkins Act. We have already pointed out that under the terms of the applicable tariffs of the rail carriers in the instant case the car mileage earnings were payable by the carriers to the car owner (petitioner herein) and not to the respondent El Dorado Company. It has also been shown that payment of the car mileage in full by the Car Corporation to the El Dorado Company would result in a reduction in the latter's transportation charges below the lawful tariff rates.

Respondent cites no other cases. It has failed to discover or present any decision of any court whatever supporting the doctrine of the decision here sought to be reviewed. Respondent has failed to cite a case in opposition to any of the authorities upon which petitioner relies. We must take it accordingly that no opposing decision could be found.

We repeat that the decision of the Circuit Court of Appeals herein is opposed to the entire current of authority and that it is without precedent or counterpart in the history of common carrier regulation. Never heretofore has it been held or suggested that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of car mileage revenue received by the car owning company over the costs incurred by the shipper in obtaining and using the cars.

### C. The Car Mileage Tariffs.

Respondent labors to defend the conclusions of the Circuit Court as to the construction and effect of the car mileage tariffs of the rail carriers (Respondent's brief, pp. 17-19). It is exceedingly plain, however, that the court's treatment of the car mileage tariffs is not susceptible of defense upon any theory. This has been demonstrated upon pages 30 to 32, inclusive, of the brief in support of the petition.

We would again point out that this suit was not brought to enforce the provisions of the carriers' car mileage tariffs. It is rather a suit to recover upon a contract between a shipper and a car owning company. However, the Circuit Court of Appeals was so misled by the contentions of the El Dorado Company that it rested its decision largely upon a mistaken understanding of the tariff provisions and their effect. Initially it upheld the shipper's right of recovery primarily upon the ground that under the provisions of the applicable tariffs of the rail carriers the car mileage allowances were payable to the shipper

(R. 329). We have pointed out that the tariff provisions did not so provide (Brief in support of petition, p. 30). The error of the court in interpreting the tariffs was brought to its attention in the petition for rehearing. Thereupon the court, in its supplementary opinion, declared that "we must *assume* that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (Brief in support of petition, p. 31). The assumption thus indulged was wholly contrary to the record, since the applicable rules of the car mileage tariffs are in the record, at the instance of the El Dorado Company, and are specifically identified by stipulation of counsel (Brief in support of petition, p. 31).

Respondent's treatment of the record in this respect serves merely to confuse and obscure. Respondent does not argue in explicit terms that the mileage earnings were payable to it under the terms of the car mileage tariffs, but seeks rather to create this impression by indirect suggestion or inference. Thus it is stated that under the terms of the car mileage tariffs the mileage earnings would be paid to the car owner or to the person who had acquired the cars "and had fulfilled certain other requirements set forth in the regulations" (Respondent's brief, p. 17). But respondent fails to point out the nature of these "certain other requirements" and that specifically, throughout the entire period covered by the suit, the car mileage was payable only to the party whose "reporting marks" were on the cars. Respondent also fails to point out that the "reporting marks" were those of the Car Corporation (petitioner) and not those of the respondent

El Dorado Company. The facts in this connection, have been explicitly set forth upon page 31 of the brief supporting the petition and respondent finds itself in no position to question the accuracy of that presentation.

Petitioner has further pointed out that during the last two months of the period covered by the suit the tariff rules contained a restrictive clause forbidding payment to a lessee such as the respondent El Dorado Company (Brief in support of petition, p. 31). Respondent now protests that this is the first time the petitioner has referred to this tariff regulation (Respondent's brief, p. 18). In this the respondent is again in error. This regulation was brought specifically to the attention of the trial court. Counsel for both parties agreed that it should be in the record, and it is in fact in the record (R. 197). The attention of the Circuit Court of Appeals was specifically directed to this tariff rule in the petition for rehearing in the Circuit Court.<sup>1</sup>

(1) Respondent is in error in stating that this provision "does not affect any part of the sum sued for by respondent in the Court below" (Respondent's brief, p. 18). The fact is that the suit was brought to recover the car mileage payments collected from the railroads by petitioner "up to the 31st day of May, 1935" (R. 46). The tariff rule effective April 1, 1935, was therefore in force during two months of the period. Moreover the ledger sheets introduced in evidence by respondent include a record of car mileage earnings for the month of April, 1935, received from the carriers on May 25, 1935 (R. 183).

The assertion is incorrect that "the tariff regulations referred to on page 31 of the petitioner's brief do not in any manner affect the sum involved in this suit \* \* \* (Respondent's brief, p. 19). If the intended reference is

Moreover, petitioner repeatedly and explicitly contended before the Circuit Court that at no time during the period covered by the suit did the car mileage tariffs of the rail carriers provide for the payment of the car mileage allowances to the respondent El Dorado Company. The failure of the Circuit Court properly to construe the tariff provisions is doubtless attributable to the insistent contention of respondent that the car mileage tariffs provided for or permitted payment of the car mileage earnings to the El Dorado Company although in point of fact they did not so provide or permit at any time during the period embraced by the suit.

It may be added finally that respondent's attempt to find support for its case in the tariff rules is misconceived, since, as this Court declared in *Merchants Warehouse Co. v. United States*, (283 U. S. 501, 511):

"Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form can not clothe it with immunity."

See also *Baltimore & Ohio R. Co. v. United States*, (305 U. S. 507, 524).

simply to the tariff regulation which took effect on April 1, 1935, it is erroneous for the reasons just stated. If on the other hand the comment is directed to all of the tariff regulations reviewed on page 31 of the petitioner's brief, it is wrong in its entirety. We have attempted to make it exceedingly plain that the rules of the car mileage tariffs, in effect throughout the entire period covered by the suit, provided for payment of car mileage to the petitioner (as the car owner whose reporting marks were on the cars) and did not provide for or permit payment by the rail carriers to the respondent El Dorado Company.

### D. The Agency Theory.

Respondent undertakes to defend the theory of the court that the El Dorado Company is entitled to receive the full amount of the car mileage earnings received by the car owning company (petitioner herein) from the rail carriers upon the ground that the payments were received in an agent's capacity and therefore must be paid over in their entirety to the shipper-lessee (Respondent's brief, p. 19). The attempted defense is unconvincing, and we are content by way of reply to refer to the discussion of the respondent's agency theory upon pages 32 to 34 inclusive of the brief in support of the petition. No agency in fact existed, but if it be assumed that the relation of principal and agent actually came into existence, it is plain that the provisions of the Act may not thereby be circumvented. The prohibitions of the law against rebates or concessions in any form or by any device may not be thwarted by creating an "agency" through which a shipper may obtain "monetary profits" which he could not secure directly from the rail carriers. Respondent has cited no case in even ostensible support of the agency theory.

## II.

### THE PLEA IN DEFENSE: SUPPORTING PROOF.

The function of pleading is to acquaint the adversary and the court with that upon which the pleader relies. Petitioner's answer raised a legal defense to the cause of

action asserted by the El Dorado Company. It averred that if it should pay over ~~to~~ respondent El Dorado Company "any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that \* \* \* (the El Dorado Company) \* \* \* would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). The plea satisfied principle and precedent alike. As shown upon pages 40 and 41 of the brief in support of the petition, it served fully to acquaint the adversary and the court with the nature of the defense relied upon.

At no time, in either the District Court or in the Circuit Court of Appeals, was the adequacy of the plea challenged ~~by the~~ respondent El Dorado Company. It was fully understood that petitioner was contending that, by the payment to respondent El Dorado Company of any part of the excess car mileage earnings which had been withheld by petitioner, ~~respondent would secure the transportation of~~ its property at less than the tariff rates.

In respondent El Dorado Company's opening brief filed with the Circuit Court of Appeals it was stated (page 10):

"The sole question at issue is whether appellee was prohibited by the cited provisions of the Elkins Act from making the said payments according to the terms of its said contract—that is to say, whether such pay-

ments, if made, would amount to a rebate, a concession, an advantage or a discrimination prohibited by the cited provisions of the Elkins Act. (R. 43, 44.)"

Again upon page 12 of the same brief for respondent it was stated that

"The sole question involved is directly raised by the pleadings."

In his opening argument before the Circuit Court of Appeals counsel for respondent stated (Tr. of Oral Argument p. 5):

"Now, the whole question, therefore, hinges upon whether or not the payment contracted to be made by the tank car company is a violation of the provisions of the Elkins Act. *It is raised first, on the face of the answer and, second, on the face of the record.* The court held that it was." (Emphasis supplied.)

The conclusions of the District Court properly set forth the ultimate fact that payment to the respondent El Dorado Company of the excess of the car mileage earnings over rental would result in the latter's receiving transportation at less than tariff rates (R. 35). Nothing more was needed. It is now too late in any event to raise any question as to the form of the findings and conclusions (*O'Reilly v. Campbell*, 116 U. S. 418, 421).

Petitioner fully sustained its burden of proof, as shown upon pages 38 to 40 of the brief supporting the petition. This was not questioned by respondent at any time, either in the District Court or in the Circuit Court of Appeals.

Respondent now argues that it was not required to prove the legality of performance under the contract (Respondent's brief, p. 22). Petitioner has made no such contention. However, petitioner has shown that there was ample evidence of record to sustain its burden of proof in accordance with well established rules of evidence and that respondent therefore was required to produce countervailing evidence to meet the case made out by petitioner or accept an adverse decision.

The amount of the car rental payable by respondent and the amount of the car mileage accruing upon the leased cars were both shown. Respondent to the contrary notwithstanding, it was not within the power of petitioner to determine whether the respondent El Dorado Company had incurred any costs, additional to car rental, in connection with the use of the leased cars. The facts respecting such additional costs, if any there might have been, were wholly within the knowledge of respondent El Dorado Company and were not within the knowledge of petitioner. Petitioner's experience with other shippers could not serve to acquaint petitioner with the costs of such shippers, nor could such information, if obtained, serve either to establish or negative costs on the part of respondent (Respondent's brief, p. 22).

The case was presented by both parties upon the theory that the car rental payable by respondent El Dorado Company constituted its entire cost. This is not denied by respondent. While it now suggests the possibility of additional "costs and obligations" (Respondent's brief, p. 23).

explicitly refrains from showing that any such additional costs were actually sustained.<sup>1</sup>

Without objection on the part of respondent El Dorado Company the case was decided by the District Court upon basis that the car rental was the only cost to the respondent El Dorado Company. Under well-settled principles the parties could not, and they did not, adopt a different theory of the case in the Circuit Court of Appeals. The Circuit Court of Appeals upon its own initiative suggested the possibility of additional costs in its opinion. This was improper. It had no foundation of record and was not responsive to any contention on the part of respondent El Dorado Company. As was said in *Arkansas Phosphate Coal and Land Co. v. Stokes*, (C.C.A. 8th) 2 (2d) 511, 515:

"In short, to state the rule simply and baldly, the theory on which the case is tried *nisi* is the theory on which it must, on appeal, be weighed for error."

We rest upon the treatment of this element upon pages 40 to 41 inclusive of the brief supporting the petition. Respondent has been unable to meet the authorities which are there cited and which lay down the rule that the theory in which a case is tried and determined must be strictly adhered to upon appeal.

Respondent argues that it was required to pay car rental in advance, and thus had part of its investment "tied up" until mileage could be earned. (Respondent's brief, p. 23). The record shows, however, that no rental was ever paid by respondent, and that rental accrued was fully offset by mileage earned (R. 172, 177-178).

## III.

PERFORMANCE UNDER CONTRACT MUST CONFORM WITH  
THE REQUIREMENTS OF THE ELKINS ACT.

Upon pages 41 to 43 of the brief supporting the petition we cited cases to the principle that when the performance of a contractual undertaking is found to be in conflict with the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act. Respondent offers no countervailing authorities.

---

CONCLUSION.

As respondent would now have it, petitioner is merely seeking to escape its obligations to respondent to pay over mileage earnings (Respondent's brief, p. 24). The fact is, and the parties so recited in their written stipulation (R. 45, 47-48), that petitioner faithfully paid over the excess mileage earnings to respondent El Dorado Company until admonished by the ruling of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars, supra*, that the practice was unlawful. Thereafter respondent was credited with car mileage earnings in amounts equalling its car rental, and only the excess was withheld.

The ruling of the Circuit Court of Appeals in the instant case is opposed to the decisions in all other cases arising under cognate circumstances. Respondent has been unable to produce an authority affording support for the novel doctrine announced in this cause. We are satisfied that no such authority exists.

The public importance of the issue here submitted is clear. The rule announced by the Circuit Court of Appeals in this cause should not be permitted to fix standards for the guidance of carriers, car owning companies and shippers in connection with the use of privately owned cars. Judicial sanction should not be given to the use of privately owned cars as a means by which shippers may secure rebates, concessions and advantages.

Respectfully submitted,

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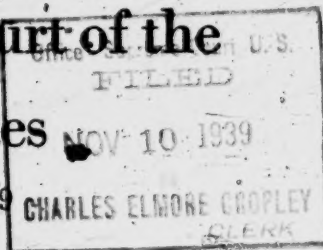
Dated at San Francisco, California, August 30, 1939.



# In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 129



GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

VS.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

## Brief of General American Tank Car Corporation, Petitioner

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# In the Supreme Court of the United States.

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,  
a corporation,

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY,  
a corporation,

*Respondent.*

## Brief of General American Tank Car Corporation, Petitioner

This cause is here on writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered on March 17, 1939, in a cause numbered and entitled on its docket No. 8799, *El Dorado Terminal Company, a corporation, Appellant, v. General American Tank Car Corporation, a corporation, Appellee*, reversing a judgment of the United States District Court for the Northern District of California, Southern Division.

### OPINIONS BELOW

Opinions of the Circuit Court of Appeals:

104 Federal (2d) 903 (R. 304,339);

104 Federal (2d) 916 (Denying Rehearing, R. 341-348.)

No opinion was rendered by the District Court. Its findings of fact, conclusions of law and judgment are in the record (R. 29-37):

### JURISDICTION

1. The judgment of the Circuit Court of Appeals was entered on March 17, 1939. Petition for rehearing was seasonably filed and was denied on May 19, 1939.

2. The petition for writ of certiorari was filed in this Court on June 22, 1939. The order granting certiorari was entered on October 9, 1939.

3. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. §347).

### STATEMENT OF THE CASE

#### (1) The Essential Issue.

A single issue of federal law, arising under the Elkins Act, is presented in this cause, although certain subordinate issues, neither presented nor considered in the District Court, were raised for the first time in the opinions

of the Circuit Court of Appeals.<sup>1</sup> The essential question involved is whether a shipper, to whom railroad freight cars were leased by a car owning company, may, without violating the Elkins Act, recover from the car owner pursuant to the lease the full amount of the payments received by the car owner from the rail carriers for the use of the leased cars in interstate commerce when it appears that such payments exceed the amount of the shipper's car rental. Specifically the question is whether by such payment the shipper will secure the transportation of its property at a less rate than that named in the published freight tariffs. The Elkins Act provides

"That \* \* \* it shall be unlawful for any person; persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce \* \* \* whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs \* \* \* or whereby any other advantage is given or discrimination is practised." (32 Stat. 847, 34 Stat. 587-588; 49 U.S.C. §41 (1); Appendix, p. i.)

The material facts appear without controversy. In large measure they were set forth in a written stipulation (R. 45 et seq.).

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(1) The parties were agreed, in the trial of the case in the District Court as well as in the presentation to the Circuit Court, that but a single issue of law is involved, as is more fully shown upon page 67 of this brief.

**(2) Nature of Suit.**

The cause arises out of a suit at law brought by respondent, El Dorado Terminal Company,<sup>1</sup> lessee of certain railroad tank cars from petitioner, General American Tank Car Corporation,<sup>2</sup> the owner and lessor of such cars, to recover from the Car Corporation pursuant to the lease certain moneys hereinafter styled "car mileage" received by the Car Corporation from the rail carriers as compensation for the use of the cars in the transportation of property of the El Dorado Company in interstate commerce. The moneys sought to be recovered by the El Dorado Company constitute the excess of the "car mileage", so received by the Car Corporation from the rail carriers, above the amount of the car rental payable by the El Dorado Company for the leased cars. The defense was that the payment of such excess would violate the Elkins Act, in that thereby the El Dorado Company would indirectly secure the transportation of its property at less than the published freight rates. The judgment of the Circuit Court of Appeals would require the Car Corporation to pay over to the El Dorado Company the excess of the car mileage above the car rental.

**(3) Car-Leasing Agreement Involved; Performance Thereunder.**

Prior to the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 206

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(1) Respondent, El Dorado Terminal Company, is a wholly controlled subsidiary of its assignor, El Dorado Oil Works. For convenience respondent and its assignor are each, without distinction, referred to hereinafter as the "El Dorado Company".

(2) Referred to hereinafter as the "Car Corporation".

I. C. C. 323 (July 2, 1934), hereinafter reviewed, the Car Corporation had entered into a written agreement (September 28, 1933) with the El Dorado Company whereby it agreed for a term of three years commencing on January 1, 1934, to lease to the El Dorado Company certain tank cars for the shipment of the latter's products at a specified monthly rental for each car, so leased (R. 20-28).<sup>1</sup> The specified rental was \$27.50 per car per month for fifty cars styled "Permanent Cars", and \$30.00 per car per month for such additional cars as the El Dorado Company might require (R. 23). It was further agreed that the Car Corporation would collect from the rail carriers over whose lines of railway such cars would pass, the car mileage payments made by the rail carriers as compensation for the use of such cars in railroad service, and would credit the payments so collected to the car rental or service account of the El Dorado Company (R. 26).

Throughout a period of approximately six months extending from January 1, 1934, to June 30, 1934, inclusive, it was the practice of the Car Corporation in the performance of its contract to credit the car rental account of the El Dorado Company with the full amount of the car mileage payments received by the Car Corporation from the rail carriers, even though they exceeded the car rental, and to pay over the excess monthly to the El Dorado

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(1) The agreement provided that "No title or leasehold or property interest of any kind in said cars, or any of them shall vest in the second party or its successors or assigns under the terms and provisions of this service contract, or by reason of the delivery of possession of cars to the second party or its use thereof hereunder." (R. 27-28.)

Company (R. 47-48). This practice was continued until the publication of the decision of the Interstate Commerce Commission on July 2, 1934, in

*Use of Privately Owned Refrigerator Cars, supra,*  
(R. 49)

whereupon the Car Corporation felt compelled to modify the practice.

In this decision the Commission declared that the payment to shippers of mileage earnings, "either direct or through car owners", in excess of the amount of car rental and other actual expenses incurred by the shippers, is in violation of the Elkins Act. The findings of the Commission were confined to practices in connection with the use of privately owned refrigerator cars, since the investigation itself was thus limited. But the Commission pointedly observed:

"The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars."  
(R. 159.)

Pursuant to this decision condemning practices of this character as violative of the Elkins Act, the Car Corporation, which theretofore had faithfully made the agreed payments, refused further to credit or pay over to the El Dorado Company the car mileage in excess of the car rental. Accordingly, commencing after the month of June, 1934, the Car Corporation credited the car mileage payments to the El Dorado Company in amounts equal to the car rental but made no payment of the excess. In an

agreed statement of facts signed by the parties and received in evidence at the trial (R. 45, 48), it was stipulated, *inter alia*, that the Car Corporation's refusal to pay over this excess was based on its conclusion, upon advice of counsel, following the decision of the Commission referred to above, that such payment would be in violation of the Elkins Act.

The contract was not rescinded but the El Dorado Company elected to continue its use of the cars of the Car Corporation.

**(4) The El Dorado Company Has Made No Payment by Way of Car Rental.**

After this change in practice on the part of the Car Corporation, the El Dorado Company still paid no car rental in fact, since the rental was invariably offset by the crediting of car mileage in an equal amount (R. 172). At no time was the El Dorado Company required to make any payment by way of car rental (R. 177-178).

**(5) Car Mileage Exceeded Shipper's Car Rental by Substantial Amounts.**

The amounts by which the car mileage payments have exceeded the car rental are substantial. It is readily deductible from the ledger sheets reflecting the entire car rental account between the parties covering the period involved in the suit (plaintiff's Exhibit No. 1, R. 182, 183-187) that during the period of seventeen months extending from January, 1934, to May, 1935, both inclusive, the El Dorado Company's car rental amounted to \$25,651.26. It is shown by the record stipulation (R. 45, 46)

that the car mileage paid by the rail carriers on the leased cars for the same period aggregated \$51,403.58. The car mileage earned by the cars was therefore approximately twice the car rental. We present the figures in tabular form:

Aggregate car mileage for 17 months.....\$51,403.58

Aggregate car rental for 17 months..... 25,651.26

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Excess of car mileage over car rental.....\$25,752.32<sup>1</sup>

This is the measure of the profit which would have been enjoyed by the shipper if the car mileage in its entirety had been credited to the shipper's account. Since the car rental provided by the contract was \$27.50 to \$30.00 per car per month (R. 23), and the car mileage was more than twice the rental, the excess of the car mileage payments over the car rental amounted on the average to approximately \$27.50 per car per month. Thus when freight charges are paid to the rail carriers in some particular amount for the transportation of the products of the El Dorado Company, such freight charges would be reduced to the extent of approximately \$27.50 per car per month.

(6) Under the Railroad Tariffs the Car Mileage Was Not Payable to the El Dorado Company.

Throughout the first fifteen months of the period covered by the suit the applicable rules of the car mileage

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(1) This figure exceeds the amount sued for—i.e., \$18,532.78—for the reason that prior to June, 1934, the Car Corporation credited the entire car mileage to the El Dorado Company.

tariffs<sup>1</sup> provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars as shown by the "reporting marks" (R. 192-197). The "reporting marks" borne by the leased cars were not those of the El Dorado Company, but were those of the Car Corporation, the owner, in conformity with the requirements of the contract (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause forbidding payment to a lessee such as the El Dorado Company. The clause reads:

"Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee \* \* \**" (R. 197.) (Emphasis supplied.)

**(7) Cars Used Almost Wholly in Interstate Commerce.**

The cars leased by the Car Corporation to the El Dorado Company were used in the transportation of the latter's shipments over the lines of common carriers by rail subject to the Elkins Act. Ninety-nine per cent or more of the shipments were interstate in character (Stipulation, R. 47).

(1) Doubtless it is understood that the car mileage allowances are published in tariffs which are distinct from the conventional freight rate tariffs. The former set forth the allowances which will be paid by the carriers for the use of privately owned cars, together with the rules governing payment. The latter set forth the rates which will be assessed by the carriers for the transportation of the shipper's property.

## (8) Proceedings in Courts Below.

The El Dorado Company brought suit seeking the recovery of the balance of the car mileage payments which had been received by the Car Corporation; that is, the excess above the car rental, amounting to \$18,532.78. In defense, the Car Corporation pleaded that it was prohibited by law, and particularly by the Elkins Act, from paying over such excess car mileage revenue to the El Dorado Company, in that the El Dorado Company thereby "would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 18.)

A jury was waived (R. 29). The District Court sustained the Car Corporation's plea in defense. The court concluded, *inter alia*:

"That, if defendant were to credit or to pay over to plaintiff or to said El Dorado Oil Works any part of the mileage payments received from said common carriers by defendant, as the owner of said tank cars, in excess of the car hire or rental reserved in said agreement, such credit or payment would be unlawful in that plaintiff or said El Dorado Oil Works would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation, thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act." (R. 29, 35.)

Judgment was given accordingly for the Car Corporation. (R. 36-37).

Upon appeal, the Circuit Court of Appeals reversed the judgment of the District Court, holding that the balance of the car mileage payments should be paid over to the El Dorado Company (R. 339, 340).

### **SPECIFICATIONS OF ERROR**

The Circuit Court of Appeals erred:

1. In failing to hold that the owner of railroad freight cars leased to a shipper for the transportation of the latter's property in interstate commerce by railroad is prohibited by law, and particularly by the provisions of the Elkins Act, from paying over to the shipper any part of the car mileage payments received by the car owner from the rail carriers as compensation for the use of such cars in excess of the shipper's car rental and other costs, if any, in that thereby the shipper would obtain a rebate or concession and an advantage or discrimination in respect to its shipments, in violation of the provisions of said Act.

- (a) In holding that a "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, does not constitute a rebate prohibited by the Elkins Act.

- (b) In holding that under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were payable to the shipper-lessee.

(c) In holding that a car owner, "as agent," is legally obligated to pay over to its principal, the shipper-lessee, and that the latter may lawfully receive the full amount of the car mileage payments made by the rail carriers to the car owner, even though a "profit" is thereby realized by the shipper-lessee.

2. In holding that the car owner, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was required to plead and prove that such shipper had incurred no expense in addition to the car rental in connection with the use of the leased cars, and failed to sustain that burden.

3. In failing to hold that the full performance of the contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, and that for that reason the enforcement of the contract must yield to the enforcement of the Act.

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#### SUMMARY OF ARGUMENT

1. When the full performance of a contractual undertaking would produce results offending against the terms and purpose of the Elkins Act, the enforcement of the contract must yield to the enforcement of the Act.

2. A car owning company is precluded by the Elkins Act from paying over to a shipper-lessee, and the latter

is prohibited from receiving, car mileage payments, received by the car owning company from the rail carriers for the use of leased cars in interstate commerce, in amounts exceeding the car rental and other costs, if any, of such shipper-lessee, in that thereby the shipper-lessee would obtain a rebate or concession in respect to its shipments.

(a) A "profit" obtained by a shipper-lessee of privately owned cars, represented by the excess of the car mileage payments made by the rail carriers over the costs incurred by the shipper-lessee in obtaining and using the cars, constitutes a rebate prohibited by the Elkins Act.

(b) Under the applicable provisions of the car mileage tariffs of the rail carriers the car mileage allowances made by the rail carriers for the use of the leased cars were not payable to the shipper-lessee.

(c) A car owning company, "as agent," is not legally permitted to pay over to a shipper-lessee, as principal, and the latter may not lawfully receive, the full amount of the car mileage payments made by the rail carriers to the car owner, when a "profit" is thereby realized by the shipper-lessee.

3. The car owning company, defending its refusal to pay over to a shipper-lessee the excess of the car mileage payments received from the rail carriers above the amount of the shipper's car rental upon the ground that the payment of such excess would violate the Elkins Act, was not required to plead and prove that such shipper had in-

curring no expense in addition to the car rental in connection with the use of the leased cars. The burden was in any event sustained.

## ARGUMENT

### I.

**WHEN THE PERFORMANCE OF A CONTRACTUAL UNDERTAKING IS FOUND TO BE IN CONFLICT WITH THE ELKINS ACT, THE ENFORCEMENT OF THE CONTRACT MUST YIELD TO THE ENFORCEMENT OF THE ACT.**

It is elementary that a contractual obligation will not be enforced by the courts if thereby the law would be violated. This Court has said:

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court."

*Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 375.

This Court has also said:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

*Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357.

This generic principle is well established and its application is thoroughly understood. It has been made particu-

larly clear by this Court that when the provisions of a contract offend against the terms and purpose of the Elkins Act the enforcement of the contract should be enjoined.

*United States v. Union Stockyard & Transit Co.*  
226 U. S. 286, 309.

(See also *New York, New Haven & Hartford R. R. v. I. C. C.*, 200 U. S. 361, 402; *Armour Packing Co. v. U. S.*, 209 U. S. 56, 81-82; *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 474.)

Stripped of nonessentials, the case for the El Dorado Company comes to this:

The El Dorado Company made a contract with a car-owning company whereby certain cars were to be leased to it at a stipulated rental and wherein it was provided that the car mileage payments received by the car owning company from the rail carriers would be credited to the El Dorado Company's rental account. The mileage payments received by the car owning company from the rail carriers exceed the compensation payable from the El Dorado Company to the car owning company by substantial amounts. Admonished by a decision of the Commission pointing to the requirements of the Elkins Act, the car owning company has changed its practice under the contract so as to credit the El Dorado Company with car mileage equal to its car rental and no more. Payment of the excess car mileage earnings is none the less demanded by the El Dorado Company.

The material facts of the El Dorado Company's case are largely comparable with the facts revealed by the Commission's report in *Use of Privately Owned Refrigerator Cars, supra*, and expressed in part by the following excerpts from its report:

"The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies under the contracts and remit the remainders to the shippers. The contract price is usually fixed sufficiently low so that the mileage earnings will exceed the cost to shippers. It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be, but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, if only sufficient cars to take care of assured needs are leased, profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment." (R. 157.)

"The competition is keen, resulting in the cutting of rentals and intensive solicitation of shippers. The most fertile field is shippers who have a fairly regular volume of traffic the year round, such as dealers in dairy products, canned goods, and candy. By leasing or renting only enough cars to take care of their

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(1) Emphasis appearing in this brief is supplied unless otherwise indicated.

assured traffic, leaving the carriers to furnish cars to move the remainder, they are able to keep their cars moving most of the time, and the mileage earnings usually exceed the compensation paid the car owners by substantial amounts." (R. 60.)

We find no distinction of substance between the practice which the El Dorado Company seeks to have approved and the practice which the Commission condemned as violative of the Elkins Act. The El Dorado Company is not content with the crediting of car mileage in a sufficient amount to offset its car rental. It is not satisfied merely to be relieved of the payment of all car rental. It seeks the car mileage earnings in their entirety, even though they exceed the car rental "by substantial amounts." It argues that, irrespective of the amount of its resulting "profit", it may claim that profit in reliance upon its contract. That profit, as we have indicated, would amount approximately to \$27.50 per car per month.

The El Dorado Company has suggested, in its brief in reply to the petition for certiorari (p. 24), that the Car Corporation is merely seeking to escape its contract obligations to respondent to pay over the mileage earnings. The suggestion comes hardly in good part in view of the written stipulation of the parties (R. 45, 47-48) showing that the Car Corporation faithfully paid over the excess of the car mileage earnings over the car rental until it concluded, upon the advice of counsel given upon the decision of the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, *supra*, that continuation of the practice would be unlawful. After this change in practice on the part of the Car Corporation, the El

Dorado Company did not rescind the contract, but elected to continue its use of the leased cars. It still paid no rental in fact on the cars so used.

The El Dorado Company is without just grievance so long as it is credited with car mileage in an amount sufficient to offset its car rental. It is not out of pocket, although it is denied the profit which it would secure through the allowance of car mileage in full. The car owner properly receives the car mileage paid by the carriers, but it cannot rightly pay over to a shipper-lessee more than that which will suffice to offset the shipper's car rental and other costs, if any be shown.<sup>1</sup> In withholding the excess the car owner does no more than pursue the course of action under the contract which will avoid conflict with law.

No alternative course was open to the Car Corporation, unless it were willing to disregard the Commission's ruling as to the requirements of the Elkins Act and confront the consequences of its defiance. One private car owning company disregarded the admonitions of the Commission and was indicted for violation of the Elkins Act by reason of an arrangement whereby a shipper-lessee received car mileage in excess of its car rental.

*U. S. v. North Western Refrigerator Line Co.*

U. S. D. C. Northern Dist. of Ill., No. 29046; indictment returned June 13, 1935.<sup>2</sup>

(1) The record in this cause contains neither proof nor claim of costs other than car rental sustained by the El Dorado Company in the use of the leased cars. See discussion *infra*, pp. 58 et seq.

(2) This is the indictment referred to in the opinion of the Circuit Court of Appeals (R. 326).

While the Car Corporation is not a common carrier nor subject to regulation as such, it is not for that reason immune to the law. Its function is to furnish cars for use in transportation service. The law permits the employment of privately owned equipment in railroad service but jealously guards such use to the end that means shall not be afforded by which the prohibitions against rebating and discrimination in any form may be set at naught. The term "transportation" is defined in paragraph (3) of Section 1 of the Act (24 Stat. 379. 41 Stat. 471-475; 49 U. S. C. §1 (3); Appendix p. ii) to include "cars, and other vehicles, \* \* \* irrespective of ownership or of any contract, express or implied, for the use thereof \* \* \*." This definition convincingly attests the determination of the lawmaking authority to prevent the use of the private car, irrespective of "*any contract*", as an instrument of rebating, discrimination or preference.

The effect of the decision of the Circuit Court in the instant cause is to enforce a contractual undertaking on the part of a car owning company to a shipper-lessee notwithstanding that the shipper-lessee will thereby secure a "monetary profit" constituting a *pro tanto* abatement or remission of the published freight charges. The decision recognizes no limits upon the results that may be accomplished by contract between a car owning company and a shipper-lessee. The parties may bargain freely as to the disposition or division of the car mileage payments made by the rail carriers to the car owning company. Whatever the measure of profit, and however diverse the treatment meted out to different shippers, this decision would require performance in accordance with the strict letter of

each contract. Thereby the decision would reverse the rule of law which has heretofore prevailed, and would require the statute to yield to the contract.

## II.

A CAR OWNING COMPANY IS PRECLUDED BY THE ELKINS ACT FROM PAYING OVER TO A SHIPPER-LESSEE, AND THE LATTER IS PROHIBITED FROM RECEIVING, CAR MILEAGE PAYMENTS, RECEIVED BY THE CAR OWNING COMPANY FROM THE RAIL CARRIERS FOR THE USE OF LEASED CARS IN INTERSTATE COMMERCE, IN AMOUNTS EXCEEDING THE CAR RENTAL AND OTHER COSTS, IF ANY, OF SUCH SHIPPER-LESSEE, IN THAT THEREBY THE SHIPPER-LESSEE WOULD OBTAIN A REBATE OR CONCESSION IN RESPECT TO ITS SHIPMENTS.

The District Court found and concluded that, if the Car Corporation were to pay over to the El Dorado Company the excess of the car mileage payments over the car rental, the El Dorado Company would secure the transportation of property at rates less than the rates named in the published and filed tariffs of the rail carriers, thereby obtaining a rebate or concession. The record admitted of no other result. The Circuit Court of Appeals should have so held.

### A. The Shipper's "Profit" as a Rebate.

The holding of the Circuit Court of Appeals to which the petitioner's challenge is particularly directed is as follows:

"(3) The Elkins Act makes it a criminal offense for the railways to pay less than their established

mileage rates for the cars supplied by the El Dorado Company. The mileage rates properly are based upon averages which assume that certain shippers-suppliers having lower costs will make a profit. *Such profit does not constitute a rebate prohibited by the Act.*" (Opinion, R. 311)

This declaration is without precedent or counterpart in the history of common carrier regulation. It is hostile to ruling principles repeatedly announced and enforced. In its specific application to the use of privately owned cars, it is opposed to every other ruling within petitioner's knowledge. Never heretofore has it been held or implied that a shipper, by becoming a lessee of privately owned cars, may lawfully enjoy a "profit" represented by the excess of the car mileage revenue over the costs incurred by the shipper in obtaining and using the cars.

The court has erred in its premises as well as in its declaration of principle. The language employed by the court implies that failure to pay the car mileage to the El Dorado Company would be a tariff deviation and for that reason would violate the Elkins Act. Such is not the case. As shown on page 53 of this brief, failure of the rail carriers to pay the car mileage earnings to the El Dorado Company could not be "a criminal offense" under the Elkins Act, since under the provisions of the car mileage tariffs the mileage earnings were not payable to the El Dorado Company.

Moreover, the court has mistakenly understood that the car mileage rates are based upon average costs of "shipper-suppliers", including shipper-lessees, thereby leading

the court to conclude that such lessees are entitled to the entire car mileage allowances irrespective of any resulting "profit". The fact is that the car mileage rates are based wholly upon the costs of car owners, and in no part upon the costs of lessees of such cars. (*In the Matter of Private Cars*, 50 I. C. C. 652, 687.) The car mileage allowances are intended to reimburse car owners for the costs of ownership, comprehending, in addition to other costs, the expense of maintenance and repairs, taxes, depreciation and interest on investment. The car mileage rate is determined in relation to these elements. It is not intended to return a "profit" even to the car owner. This is shown by the following statement taken from the report of the Commission in *Matter of Private Cars*, *supra*, page 687:

"It is conceded by car owners that they are not properly entitled to make a profit on their cars used by the carriers."

Since shipper-lessees have no investment in the leased cars, no part of the car mileage payments to them could represent return upon investment in the cars. This fact is specifically noted by the Commission in the following excerpt from its decision in *Use of Privately Owned Refrigerator Cars*, *supra*:

"None of the shipper protestants who presented testimony own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the published rates." (R. 145)

The court has gone so far as to declare that the Commission has recognized "that shippers leasing cars would have different rentals, one from another, and hence that the rental may be profitably less than the tariff" (R. 322). Plainly the court has misunderstood the Commission's views. The Commission has never recognized that "the rental may be profitably less than the tariff". On the contrary, the Commission has resolutely ruled that no arrangement may be lawfully made between a car owning company and a shipper-lessee whereby the latter is permitted to derive a profit from the use of privately owned cars.<sup>1</sup>

The statute does not provide, neither do the cases hold, that the carriers must pay to shipper-lessees the same allowances that are made to shipper-owners, regardless of the basic differences between the costs of the two groups and regardless also of the fact that thereby the shipper-lessees may be enabled to secure substantial profits out of the use of the leased cars (R. 317, 323, 324). The congressional intent, as evidenced by paragraph (13) of Section 15 of the Interstate Commerce Act (Appendix p. v), is to restrict the allowance to that which shall be "no more than is just and reasonable" and to empower the Commission

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(1) Uniformly, throughout its existence, the Commission has held that an allowance which yields any substantial profit to the shipper is an unlawful rebate. (*Allowances to Elevators by Union Pacific R. R. Co.*, 12 I. C. C. 85, 89; *Manufacturers Ry. Co. v. St. Louis I. M. & S. Ry. Co.*, 28 I. C. C. 93, 101; *Chicago, West Pullman and So. R. R. Co. Case*, 37 I. C. C. 408, 414, 416; *Allowances to Texas Gulf Sulphur Co.*, 96 I. C. C. 371, 377; *Use of Privately Owned Refrigerator Cars*, *supra*.)

to determine "what is a reasonable charge as the maximum to be paid". The uniformity which the Elkins Act was designed to secure is uniformity in the *freight charges* paid by all shippers for the transportation of their property. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 80.) It is obvious that the purpose of the Act would be defeated if shipper-lessees having favorable arrangements with car owning companies were permitted to reap substantial "profits" in varying amounts from the car mileage allowances paid by the rail carriers and thereby to reduce their net transportation costs below the published freight charges.

The Circuit Court has assumed that the car mileage rate of 11½¢ per mile for tank cars, in effect during the period in suit, has been fixed or approved by the Commission (R. 323, 324). This does not appear from the record nor from any of the cited decisions. Apparently the court has misapprehended the decision of the Commission in *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 I. C. C. 166 (R. 324): in that case the Commission merely required a switching carrier, which had no tariff providing for the compensation of car owners, to make an allowance to the complainant, a *shipper-owner*, which would be "the same as paid by the line-haul carriers" (p. 168). It did not go into the question as to the reasonableness of the allowance of 11½¢ per mile paid by the line-haul carriers. However, it is wholly irrelevant to the issue here presented whether the Commission has or has not fixed or approved the car mileage rates for tank cars. The question here is simply whether payment of the excess car mileage by the car

Corporation to the El Dorado Company would result in the reduction of the transportation charges of the El Dorado Company below the published freight rates.<sup>1</sup>

The court has cited the decision of the Interstate Commerce Commission in *Mileage Allowances on Refrigerator Cars* (1936) 218 I. C. C. 359 (R. 309, 316, 323). The court has failed to note, however, that the contemplated reduction there involved was in "the allowance paid to car companies on refrigerator cars" (p. 359). Neither shipper-owners nor shipper-lessees were involved. The report also discloses the fact that under the car mileage tariffs then in effect "the allowances for the use of shipper-owned refrigerator cars not here involved" were different from the allowances made to car owning companies (p. 360). Neither this case, nor the case of *U. S. Cast Iron Pipe & Foundry Co. v. Director General*, 57 I. C. C. 677, cited by the Circuit Court in the same connection (R. 316), affords any support for the statement of the court that uniformity of rate has often been determined by the Commission "by a computation of the average of the costs of many suppliers over a prior period of several years". The report of the Commission in the latter case shows that the allowances made by the carriers to the different industrial plants for switching service were not uniform but that they ranged from "47 cents to \$2.89" per car and had

(1) The decision in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 236 U. S. 247, does not aid the argument of the Circuit Court. There is here *no issue* as to whether the car mileage rate is "just and reasonable", as the language of the Circuit Court would seem to imply. (R. 324.)

# MICRO CARD

TRADE MARK 

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been determined individually in relation to the costs of the several industries (pp. 680, 681). In neither case did the Commission require uniformity in the allowance to all "suppliers".

Additional cases cited in the opinion of the Circuit Court (R. 323) are irrelevant to the immediate issue. None of them involved the fixing of car mileage allowances.<sup>1</sup> No decision of court or Commission has been cited, and we are satisfied that none can be cited, from which it is possible to draw as much as an inference that approval has been given to arrangements between shipper-lessees and car owning companies whereby the rental payable by the shipper-lessee "may be profitably less than the tariff".

It has been noted (p. 12 *supra*) that the Circuit Court of Appeals further held that the Car Corporation failed to prove that the El Derado Company had incurred no costs, additional to rental, in the use of leased cars. That conclusion will be separately considered hereafter. But the ruling immediately criticized is without limit or qualification. It goes the full length of declaring that, irre-

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(1) *Switching Rates in Chicago District*, 177 I. C. C. 669 (where the Commission prescribed switching rates to be charged by the carriers for their switching services in the Chicago District); *O'Keefe v. U. S.*, 240 U. S. 294 (where this Court upheld an order of the Commission fixing rate divisions to be accorded to certain tap-line railroads); *Sprunt & Son v. U. S.*, 281 U. S. 249 (where this Court affirmed an order of the Commission requiring the equalization of line-haul rates for the transportation of domestic shipments and export shipments respectively, in order to remove undue prejudice).

spective of the shipper's costs and alike irrespective of the "profit" measured by the excess of the car mileage payments above costs, such "profit" rightly inures to the shipper as the legitimate fruit of his favorable lease. According to the court, it is not to be viewed as an indirect rebate or concession, in violation of the Elkins Act.

To be concrete, let it be assumed that the car rental payable by a shipper for the use of a private car is \$30.00 but that the shipper is credited by the car owning company with car mileage paid by the rail carriers for the use of the car in the sum of \$50.00. Upon the payment of the excess of \$20.00 to the shipper he has enjoyed a net gain of profit in that amount. It should be entirely clear that this net gain of \$20.00 is a *pro tanto* reduction of the freight charges paid to the carrier at the published tariff rates for the transportation of the shipper's property. The Circuit Court, however, holds that no reduction in freight charges is thereby accomplished.

The cases heretofore decided have reached results directly contrary to those reached by the Circuit Court in this cause.

(1) Use of Private Car as a Means of Rebating  
or Discrimination.

Throughout the greater part of its existence the Commission has been gravely concerned by reason of the persistence of rebating and discrimination in connection with the use of privately owned cars. The Commission's annual reports to Congress, commencing with its Third Annual Report for the year 1889, clearly disclose its continuing

concern with the private car problem.<sup>1</sup> In its annual report for 1893 the Commission dealt at length with "*Payment of Car Mileage for Use of Private Cars*" (pp. 60 et seq.) and referred to the "many discriminations" resulting from the practice (p. 66). In its annual report for the year 1903 the Commission again emphasized the "*Evidences Resulting from the Use of Private Cars*" (p. 22 et seq.) Speaking particularly with respect to the use of stock cars, the Commission said, *inter alia*:

"it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, a practice which operated to the same effect as the payment of rebates to such shippers \* \* \*." (p. 24.)

The efforts of the Commission to eliminate improper practices in the use of privately owned cars culminated in a general investigation, nationwide in scope, instituted on the Commission's own motion on July 6, 1931. Part V of this investigation (Ex Parte No. 104) was directed specifically to "Private Freight Cars" (R. 55). For the purpose of hearing and investigation the proceeding was consolidated, so far as it related to refrigerator cars, with an Investigation and Suspension proceeding (Docket No. 3887) entitled "*Use of Privately Owned Refrigerator Cars*" (R. 49, 55). The extended hearings and investigations thereupon conducted by the Commission eventuated

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(1) Third Annual Report for 1889, pp. 18, 108; Seventh Annual Report for 1893, pp. 60-67; Seventeenth Annual Report for 1903, pp. 22-26; Nineteenth Annual Report for 1905, pp. 10, 11; Twentieth Annual Report for 1906, p. 48.

in the report and decision which, as stated heretofore, brought about the change in practice on the part of the Car Corporation in the matter of the payment of car mileage.

The complete text of the Commission's report and order is in the record by stipulation of the parties (R. 48, 49-162). It is in the record not only for the Commission's conclusions as to the requirements of law, but also for the findings of fact which served as the foundation for those conclusions. The Commission's report contains a formidable assembly of facts, arising out of a variety of situations, revealing practices in the use of privately owned cars which are destructive of the integrity of the published freight rates and which produce discrimination and preference among shippers in varying degree. The report clearly discloses the evils which must inevitably arise if there is to be no restraint upon contractual undertakings between shippers and car owning companies in the use of privately owned cars. It is shown in particular that the car mileage allowances, received by the car owning companies from the rail carriers, afford a means by which undisclosed rebates may be extended and all manner of preference may be accomplished.

The following excerpts from the Commission's report exemplify the practices condemned by the Commission, as well as the objectionable consequences resulting from the payment of car mileage allowances to shippers in excess of car rental and any incidental expense:

"The terms on which refrigerator cars are let to shippers vary. Some lessees pay a fixed monthly

rental, have their reporting marks on the cars, and the mileage earnings are paid directly to them. Some pay a fixed monthly rental, but the cars bear the reporting marks of the lessors, who collect the mileage earnings and in turn remit same to the lessees. Both forms of contract are hereinafter referred to as leases. Some shippers have cars assigned exclusively to their service that carry reporting marks of the owners. The mileage earnings are paid to such owners. If such earnings exceed a specified amount, the excess is paid to the shippers." (R. 59).

"Most of those who lease or rent cars *derive monetary profits from the mileage earnings and thereby obtain transportation at less than the published rates.*" (R. 145).

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, *whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act.*" (R. 151).

"It cannot be denied that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that *absolute level of equality* with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated." (R. 158).

"The conclusion is inescapable that the demand for the use of private cars by shippers is because of the profit flowing to them by the use of such cars. If such profits were denied to them, as we think they

must be, it is inconceivable to believe that shippers would continue to pay amounts ranging from \$30 to \$50 per car per month when they could demand that the carrier supply suitable cars without cost over and above the freight charges properly applicable to the shipments transported." (R. 159).

It is not practicable to review the Commission's evidentiary findings in detail, but we may briefly exemplify.

(1) "The advantages claimed in using private cars are \* \* \*" (inter alia) "profits derived from mileage paid by the carriers" (R. 74). (2) A particular shipper "pays \$45 and \$50 per car per month for its leased cars and receives mileage earnings of approximately \$32.50 per car per month in excess thereof, a profit of \$6,500 per month or \$78,000 per year" (R. 79). (3) A shipper-lessee "refused to tell the amount it pays for the cars or to furnish a copy of its lease. The amount of profit it makes in mileage earnings cannot be determined" (R. 81). (4) A shipper leases cars "at a fixed amount per month which it refused to disclose. It admitted that the mileage earnings exceed the amount paid the car owners" (R. 84). (5) A shipper "learning that other shippers were making money out of private cars, secured a contract under which it was to receive all mileage earnings in excess of an agreed amount. The witness refused to state the amount, but acknowledged that in 1931 payments to it by the car company averaged \$18.35 per car per month, and in 1932 were \$21.27 per car per month" (R. 86). (6) "The majority of the shipper protestants who rent or lease cars and of the private-car lines heard herein refused to divulge the amounts paid to or retained by said car lines. The

shippers refused on the ground that they did not feel warranted in doing so without the consent of the car lines. The car lines refused on the ground that they could not afford to do so because of the keen competition between them" (R. 155-156). (7) A particular car line company leases and assigns cars to private shippers. "It is opposed to the practice, and claims it does so only in order to meet competition of other private and railroad-controlled car lines" (R. 125).

Such findings serve concretely to disclose the violations of the Elkins Act which must inevitably result if shipper-lessees and car owning companies may freely bargain as to the disposition of the car mileage payments received by the car owning companies from the rail carriers for the use of privately owned cars.

In its Summary and Conclusions the Commission said, *inter alia*:

"We further find \* \* \* that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates; and that any allowance paid to the shipper-owner of private cars, including meat packers and their operating subsidiaries or agents, by the railroads as mileage earnings in excess of the ownership cost, including a fair return on the investment, are unreasonable, unjustly discriminatory, and unlawful rebates and concessions." (R. 160).

The Commission said further:

"The discussion herein has been confined almost entirely to refrigerator cars, and the findings will be so restricted, but *the general principles enunciated apply equally to all other types of private cars.*" (R. 159).

The Commission then admonished the carriers in the following terms:

"We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper lessee which results in the payment by such shipper of charges less than the published tariff rate." (R. 160-161.)

The significance and importance of the Commission's findings and conclusions are obvious. Plainly the Car Corporation could not ignore these declarations except at the peril of prosecution for violation of the Elkins Act. It undertook to bring its practices into conformity with the requirements of law as declared by the Commission.

**(2) Principles Apply To All Types of Private Cars.**

The statement of the Commission that the principles set forth in its report are applicable to "all other types

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(1) It is stated in the opinion of the Circuit Court of Appeals that "The Car Corporation relies on a statement of the Commission in the *Refrigerator Car* case . . . ." (R. 327) This statement is inadequate. It has been made plain throughout that the Car Corporation relies upon all of the pertinent findings and conclusions of the Commission in that case.

of private cars" is dismissed by the Circuit Court of Appeals as "dictum" (R. 344). If such characterization is technically warranted, it has no justification in substance. A practice which is unlawful in relation to privately owned refrigerator cars must be equally unlawful in relation to privately owned stock cars, tank cars or cars of any other type. The requirements of the statute do not vary with differences in types of cars.

The Commission's statement, which the Circuit Court has cast aside, is a statement of that which should be obvious. It expresses a conclusion which the Commission is qualified to reach advisedly. As this Court has repeatedly indicated, the views of the experienced administrative body charged with the enforcement of the Elkins Act and related statutes are persuasive and worthy of respect.

The El Dorado Company has sought to distinguish tank cars from refrigerator cars by saying that the tariffs of the rail carriers "provided that the railroads would not furnish these tank cars for transportation purposes \* \* \*

(Brief for Respondent in opposition to certiorari, p. 2).

This characterization is inaccurate. The pertinent tariff item of the rail carriers is in these terms:

"The rates provided for freight in tank cars do not obligate the carriers to furnish tank cars."  
(R. 201)

While the carriers thus do not "obligate" themselves to furnish tank cars, they do upon occasion supply tank cars to shippers for the transportation of vegetable oils as well as other products, as shown by the record in this case (R. 164-168).

The point in any event is completely irrelevant to the issue presented. As heretofore noted, the statute expressly provides that *all* cars "irrespective of ownership or of any contract, express or implied, for the use thereof" are subject to the provisions of the Act, alike with cars of railroad ownership. The fact that the carriers do not obligate themselves to supply tank cars cannot serve to justify the use of privately owned tank cars as instruments of rebating and discrimination.

The El Dorado Company has misconceived the nature of the Commission's action in the *Refrigerator Car* case and the Circuit Court has in turn been misled. The El Dorado Company says "The question considered and decided was as to the reasonableness of the allowance so paid on refrigerator cars \* \* ." (Brief for Respondent in opposition to certiorari, p. 10). This is error. The Commission made no decision as to the *reasonableness* of the mileage rates for the use of refrigerator cars, nor did it promulgate any "order, rule or regulation" controlling payment of these allowances, either as to refrigerator cars, tank cars or any other type of equipment. The Commission found the facts and then announced its conclusions, in most explicit terms, as to the requirements of law. The order actually entered (R. 161-162) merely required the cancellation of certain tariff items which had been suspended. This was without prejudice to the filing of amended tariff rules conforming with the Commission's suggestions (R. 159-160).

The Circuit Court has understood that the decision of the Commission "expressly excludes tank cars from its

regulation" (R. 329). This statement is misleading. It is true that no findings were made respecting tank cars, but this was for the reason that the evidence as to tank cars was not comprehensive enough to warrant conclusions as to abuses. But the Commission said:

"That such abuses, however, did exist is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice." (R. 139.)

The Commission made it exceedingly plain, as disclosed by its language previously quoted, that the principles which it enunciated "apply equally to all other types of private cars" (R. 159).

It should be clear that the practice which the Commission condemned did not become unlawful by virtue of any order of the Commission or even by virtue of the Commission's findings or conclusions. It was unlawful by virtue of the prohibitions of the Elkins Act, unaided by any order or expression of the Commission. While the Circuit Court suggests that "The reasoning supporting the order on refrigerator cars may or may not be applied in a hearing in which are developed facts concerning tank cars similar to those in that case" (R. 329), we think that a contrary inference is impelled. A practice which would violate the law in connection with the use of private refrigerator cars would be equally unlawful in connection with the use of private tank cars.

The Circuit Court concluded that the tank cars were supplied to the rail carriers by the El Dorado Company and that, for this reason, the Car Corporation could not withhold "the excess of the mileage collections over rentals" (R. 308). Even if the court's premise that the cars were supplied by the El Dorado Company were to be accepted, the conclusion does not follow that the "excess of the mileage collections over rentals" may lawfully be paid over to the shipper-lessee. It need only be noted again that all cars, irrespective of their ownership and irrespective of any contract for their use, are subject to the provisions of the law prohibiting rebates or other concessions. It should also be observed that in the *Refrigerator Car* case the Commission found that the car owning companies were leasing cars to shippers for their use. These shippers were supplying the leased refrigerator cars to the carriers in the same sense in which the El Dorado Company, according to the Circuit Court, has supplied the leased tank cars to the rail carriers. Yet the Commission ruled that the payment of the excess car mileage to the shipper-lessees would violate the Elkins Act. The two cases are fully in parallel. The error of the Circuit Court consists in its failure to recognize and apply the governing principle, viz., that the shipper is not permitted, by any means whatever, to obtain a payment which operates to reduce his transportation costs below the established freight charges.

The conclusions of the Circuit Court of Appeals are wholly irreconcilable with the conclusions of the Commission. In effect the court has overruled the Commission.

That the Commission is gravely concerned by reason of the decision of the Circuit Court is attested by the following statement in its Memorandum in support of the petition for certiorari in this cause (pp. 4-5):

"Particularly important in the administration of the Interstate Commerce Act is the question of whether the receipt by the shipper of mileage allowances for leased cars in excess of the rental paid by the shipper for the cars constitutes an unlawful rebate or concession, or gives the shipper an advantage in respect to its shipments in violation of the Elkins Act."

If the decision is permitted to stand it will not only discredit the Commission's views but it may well nullify the Commission's efforts to put an end to rebating and discrimination in connection with the use of privately owned cars. Certainly it will produce that result with respect to privately owned tank cars since the holding is that shippers and car owners are free to contract as they please respecting the division of car mileage earnings and whatever the measure of the shipper's "profit" and whatever the resulting inequalities among shippers, the law is not violated thereby.

(3) **The Reichmann Case.**

The case of

*Interstate Commerce Commission v. Reichmann*, 145  
Fed. 235,

is particularly apposite. The decision of the United States Circuit Court in that case was cited and relied upon by the Commission in *Use of Privately Owned Refrigerator Cars*, *supra*. The case arose on an application by the Interstate

Commerce Commission to the United States Circuit Court for an order requiring the defendant Reichmann to answer a question propounded to him as a witness in a proceeding before the Commission dealing with practices in connection with the payment of car mileage earnings on privately owned livestock cars. Reichmann was vice-president of a car line company known as Street's Western Car Lines, a company owning some 9,000 cars in general use in the transportation of livestock over the lines of various railroads.

In the hearing before the Commission Reichmann was asked the following question: "What part of the mileage, or from whatever source, have you given up to shippers during the last six months?" Upon advice of counsel, he refused to answer. The Commission thereupon made an application to the United States Circuit Court for an order requiring the witness to answer the question. Whether the witness could be required to answer depended solely on whether the payment of the car mileage or any portion thereof to the shippers by the car owning company would result in violation of the Elkins Act. The court, after an exhaustive discussion of the law, held that by such payment the Act would be violated. An order was accordingly issued requiring Reichmann to answer the question propounded by the Commission.

Speaking with direct reference to the fact that the payment of any portion of the mileage earnings would result in a reduction of the freight tariff rates or the cost of transportation, the court said:

"The purpose of the enactment of the statutes relating to interstate commerce was to give to all ship-

pers of property uniform treatment in the matter of transportation, and the Interstate Commerce Commission was created to secure the enforcement of those statutes. . . . The question then presented is, would the payment by the private car company, of a sum of money to a shipper *who had previously paid the railway company the regular rate*, place such shipper in a more favorable position respecting the question of transportation than that prescribed by the published tariff and occupied by shippers generally, and if so, has Congress prohibited a private car company from making such payment, and is such prohibition authorized by the federal Constitution. *That the person to whom the payment is made has been, thereby, removed from the level of equality, to establish which the laws were passed, is too plain to justify extended consideration.* With respect to the transportation of his property, he is just as much better off than the general run of shippers as the payment amounts to. *The net cost of the transaction to him—his freight expense—has been reduced just that much.* It, therefore, being apparent that in such a case the purpose of the legislation has been defeated, the inquiry is, 'has this defeat resulted from the violation of a valid statute of the United States?' " (p. 237).

"The records of the proceedings of the courts and of the Interstate Commerce Commission, during the years succeeding 1887, disclose the employment of a large variety of means to evade the law. *One of these was the use of the so-called private car; that is, a car which did not belong to the railway company, but did belong either to the shipper himself or to a corporation which was neither carrier nor shipper.* it

being generally understood that in the case of the shipper whose traffic went forward in his own car, *excessive payments were made to him on the alleged score of mileage, which, in effect, brought his transportation cost below the regular rates*, and in the case of the shipper whose goods were vehicled in cars belonging to a car company, *payments of money, as commissions or otherwise, were made to him by or through the medium of such private car company; the effect of which was to give him the service at a cost below the regular tariff.*" (p. 239).

The court pointed out that it was due to these various efforts to circumvent the law as it formerly stood that the Elkins Act was passed in 1903.

The decision in the *Reichmann* case has never been overruled. The opinion has found general acceptance as a correct exposition of the law.

(4) **Principle Unaffected by 1906 and 1917 Amendments.**

The Circuit Court of Appeals in the instant cause has concluded that the ruling in the *Reichmann* case is no longer applicable for the reason that the case was "decided in 1906, shortly before the Hepburn amendment and 11 years before the car service amendment of 1917. \* \* \*"  
(R. 326).<sup>1</sup> The court has understood that these amend-

(1) The Hepburn Act amended paragraph 1 of Section 6 and added paragraph 13 to Section 15 of the Interstate Commerce Act; 34 Stat. pp. 586 and 590; 49 U. S. C. §6 (1) and §15 (13); Appendix, pp. iv, v. The 1917 amendment added paragraphs 10, 11, 13 and 14 to Section 1; 40 Stat. 101; 49 U. S. C. §1 (10) (11) (13) and (14); Appendix, pp. iii, iv.

ments served to confer upon shippers the "right" (R. 312, 316, 326) or "privilege" (R. 327) of supplying "car service" to their carriers. But the court is in error as to the effect of the amendments. It was entirely lawful, before either of these amendments was adopted, for the shippers to supply "car service" or services of various other kinds to the rail carriers, provided only that the allowances made by the carriers to the shippers should not be made in such fashion as to result either in rebating or discrimination.

*Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*,  
230 U. S. 247.

Moreover, the amendments did not operate to deprive the carriers of the right to furnish their own vehicles for the transportation of freight. Privately owned cars may be used only with the carrier's consent.

*Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 232  
U. S. 199, 214, 215.

The purpose of the Hepburn amendment of 1906 was, first, to require the tariff publication of such allowances as the carriers might make to shippers and, second, to empower the Commission to fix the maximum amounts of such allowances. The Car Service Amendment of 1917 is not applicable to "shipper-suppliers" at all. It confers jurisdiction over practices in respect to car service "as between the carriers only".

*Refrigerator Car Mileage Allowances*, 232 I. C. C.  
276, 278, 279.

Neither the 1906 nor the 1917 amendment served to legalize any practice which theretofore had been held to be

in violation of the Elkins Act. They merely implemented the Commission's authority. As pointed out by the Commission in *Matter of Private Cars*, 50 I. C. C. 652, 681, the Hepburn amendment of 1906 was specifically directed "to the prevention of rebates by way of excessive allowances to shippers \* \* \*." It remained and still remains the law that a privately owned car may be used, with the carrier's consent, in interstate commerce, but it may not be used as a means of rebating, discrimination or preference.

The Circuit Court of Appeals seeks further to distinguish the *Reichmann* case on the ground that "Though purporting to construe the Elkins Act, it does not consider its second paragraph, making criminal a carrier's deviation from such tariffs, perhaps because no such car supplying tariff was in existence."<sup>1</sup> (R. 326-327.) The implication of these words is that the car mileage in the present case was payable to the El Dorado Company under the terms of the tariffs. This is erroneous. The car mileage was *not* payable to the El Dorado Company under the provisions of the carriers' published mileage tariffs, as is shown under "B" of this subdivision (pp. 51-53, *infra*). If the rail carriers had, in the present case, paid the car mileage to the El Dorado Company, they would have been guilty of a deviation from their tariffs. Obversely, there was no deviation from the tariffs when the carriers paid the car mileage to the Car Corporation.

In the *Reichmann* case and in *Use of Privately Owned Refrigerator Cars* there was presented essentially the

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(1) The second paragraph of the Elkins Act is set out in the Appendix, p. ii.

same issue of law as that involved here. In both cases it was definitely held that the payment of car mileage earnings by car owning companies to shippers, whereby shippers obtain transportation at a net cost less than the charges accruing under the freight rates applicable to the shipments, is in violation of the Elkins Act.

(5) Rebates or Concessions Through Intervening Third Persons.

The prohibitions of the statute are not confined to transactions between carriers and shippers only. They are directed against "any person or corporation." They suffice to condemn any course of conduct on the part of a shipper and a third person, although in no wise identified with the rail carrier, whereby the shipper receives a rebate or concession. Such third person may be the owner of private cars, as in the instant case and alike in the *Reichmann* case now under review. This is made clear in the further excerpt from the opinion in the *Reichmann* case immediately to follow.

Continuing with its discussion of the terms and purpose of the statute, the court pointed out that the Act prohibits everybody, whether carrier or anyone else, from granting a concession, rebate or discrimination.

"The offering, granting, or giving, or soliciting, accepting, or receiving, any such rebate, concession, or discrimination, is declared to be a misdemeanor punishable with a fine. While this enactment, in terms, prohibits any person, persons, or corporation, from giving any concession or discrimination in respect of the transportation of property by a common carrier, the respondent contends that the only effect of

the clause quoted is to prohibit the shipper from soliciting or accepting preferential treatment from the carrier, and the carrier and its agents from offering or giving it. *This contention means that, whereas, the universally conceded purpose of the law relating to interstate commerce is to put all shippers on an equality, the shipper is still perfectly free to accept money from other source than the carrier itself, and that any person or corporation other than the carrier is at liberty to make such payment. It is not and cannot be denied that the effect of such a transaction would be to absolutely disrupt uniformity. Indeed the very purpose of the payment by the car company is to place the shipper in a position of preference, and thereby to induce him to require the carrier to furnish Street's cars for his future shipments, on which, presumably, he would receive like payments from the car company, thus securing to him a continuing financial advantage not contemplated by the regular tariff. Does the language bear this construction? Is it the deliberately expressed intention of Congress, in this legislation enacted to preserve the integrity of the published rate, that the rate may be varied by some intervening or cooperating or subserving agency, or is it the expressed intention that nobody may do what a carrier is forbidden to do? Let it be remembered that the carrier and its agents had already been required to adhere to the regular published rate, it having been specifically enacted, at the beginning of Section 1, that any offense committed by the carrier's agent, as provided by the original act, should be held to be a like offense committed by the carrier corporation. Do the words 'it shall be unlawful for any person, persons, or corporation to offer, grant or give \* \* \* any rebate, concession, or*

*discrimination . . . prohibit a private car company from paying money to a shipper 'in respect of the transportation of his property' by a common carrier in cars belonging to the car company? Such payment is not merely 'in respect of such transportation,' but it is in consideration of such transportation. And that it would be a concession or discrimination which would operate to give the fortunate pance an advantage, by reducing his freight account below the regular rate, is obvious."* (pp. 240 and 241).

The court fully considered and specifically rejected a contention similar to that persistently urged by respondent herein to the effect that the prohibitions of the Elkins Act are directed against rebates or concessions on the part of carriers only and that there can be no rebate or concession without participation or collusion on the part of a carrier. The court points out that the acceptance of such construction of the law would be "to absolutely disrupt uniformity." The clear holding is that no intervening third party may do what a carrier is forbidden to do.

(6) **The Spencer Kellogg Case.**

This point was also specifically ruled upon in the decision of the Circuit Court of Appeals for the Second Circuit in

*Spencer Kellogg & Sons v. U. S.*, 20 Fed. (2d) 459, certiorari denied 275 U. S. 566.

This decision was also cited and relied upon by the Commission in *Privately Owned Refrigerator Cars* (R. 155). The Spencer Kellogg Company was a grain elevator concern and received an allowance of one cent per bushel

for grain elevation services rendered for a railroad company in connection with the transfer of grain from lake steamers to railroad cars at Buffalo, New York. The elevator company in turn paid shippers, indirectly through a broker, one-half cent per bushel on grain sent through its elevator. For this it was held guilty on an indictment for violation of the Elkins Act. The conviction was affirmed by the Circuit Court of Appeals and a petition for certiorari was denied by the Supreme Court.

The railroad company was not a party to this arrangement nor did it have any knowledge of the practice of the elevator company. The carrier's tariff published the allowance of one cent per bushel for the service performed by the elevator company, just as here the car mileage allowance is published in the carriers' tariffs. The analogy between the two cases is at once apparent, the only difference being that in the one case the violation of the Act arises in connection with car mileage allowances and in the other in connection with elevator service allowances.

Upon reference to Paragraph (3) of Section 1 of the Interstate Commerce Act, reproduced on page ii of the Appendix to this brief, it will be noted that "elevation, and transfer in transit" of property transported and the use of "cars, . . . irrespective of ownership" are included in the term "transportation" under the same provision of the Interstate Commerce Act. The plain intent of the statute is to require those who furnish either services or facilities for transportation to do so in subordination to the Act. In brief, a third person is not permitted to supply either a service or a facility in such fashion as to avoid the prohibition against rebating and discrimination.

The elevator company contended that the Elkins Act did not apply to it because *it was not a carrier*. Here the El Dorado Company has contended similarly that the Act does not apply to the Car Corporation because it is not a carrier. But in the *Spencer Kellogg* case the Circuit Court of Appeals held, as was held in the *Reichmann* case, that the Act applies to all persons or corporations, whether carriers, shippers or others. We quote the following pertinent excerpts from the opinion of the court:

"The writ presents the question of whether a corporation, *other than a carrier* who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates.

"The application of the statute *is not limited to shippers and carriers*, but includes and punishes *any person or corporation* whose intended acts result in the transportation of property at less rates than those mentioned in the tariffs lawfully published and filed by common carriers. *Nor is it essential to convict, within the terms of the statute, to prove that there was cooperation by a common carrier.* The result forbidden by the statute was accomplished by plaintiff in error's payments to consignees and shippers, and resulted in shippers receiving their transportation at rates less than those named in the tariffs.

"... *Its broad and sweeping language* is a clear expression of the intendment of Congress to make the purposes of the act applicable to *any person* or corporation who might be in a position to commit an act which would accomplish the forbidden result, namely, the transportation of property at less rates than those named in the tariffs published by the car-

riers. The penalty is inflicted for the purpose of punishing all those who do acts declared to be unlawful and is directed to and includes the person or corporation whose acts result in the transportation of the property at less than tariff rates." (pp. 460 and 461).

"Congress intended to prohibit all rebates, concessions, or discrimination with respect to railroad transportation service. This was not confined to the regulation of carriers and shippers." (p. 461).

"The test to be applied in determining whether the act is violated is whether the terms of the statute include the acts committed. Whether the person committing the act is a shipper or carrier is not determinative. *United States v. Koenig Coal Co.*, 270 U. S. 512, 46 S. Ct. 392, 70 L. Ed. 709." (p. 461).

We should also note in passing that even if the Elkins Act were construed to be directed only against the carriers and shippers, it would still avail the respondent nothing because the respondent, the *El Dorado Company*, is the shipper here. It would not be exempt from the provisions of the statute even if the Car Corporation were exempt. The fact is that neither is exempt.

The Circuit Court of Appeals has attempted to distinguish the *Spencer Kellogg* case on the ground that there the shipper supplied no service to the carrier but received a rebate from "some third person supplying a facility in the interstate carriage" (R. 327). Similarly, respondent in its brief in opposition to the petition for certiorari (page 14) seeks to distinguish the *Reichmann* case upon the ground that there the privately owned

cars were rented to the rail carriers, whereas in the instant case they were leased to the shipper. The attempted distinction is wholly superficial. The substantial fact is that the practice condemned in both the *Spencer Kellogg* and the *Reichmann* cases was the arrangement whereby a shipper, receiving from an intervening third party a portion of the allowances paid to such party by the rail carriers, was enabled to secure a reduction in its transportation costs below the published freight charges. In substance the case here presented is identical since the shipper is demanding the payment of car mileage allowances, received by the car owning company from the rail carriers, in amounts exceeding the car rental payable by the shipper. Thus the shipper, as in each of the cited cases, would have its transportation costs reduced below the published freight charges. Whether the arrangement is effected through lease or contract, or without lease or contract, is wholly immaterial if the results forbidden by law are accomplished."

(1) The Circuit Court refers to the decision of this Court in *I. C. C. v. Dittenbach*, 222 U. S. 42, 46. (Same case below *F. H. Peavey Co. v. Union Pacific RR. Co.*, 176 Fed. 409.) (R. 317.) That case goes no further than to hold that compensation by the rail carrier to one furnishing a transportation service (e.g., elevation of grain in transit) is not prohibited by the Elkins Act if the amount paid is neither unreasonable nor discriminatory and does not result in a rebate or other concession. The opinion shows that the published allowance "barely would pay the cost of the service rendered" (p. 47). Certainly the decision does not suggest that a grain elevator company is free to pay any part of the elevation allowance to a shipper with a resulting indirect remission of the shipper's transportation charges.

The decisions in the three cases just reviewed would seem to be determinative of the issue presented in the instant proceeding. The cases are in parallel with the present case in all essential features. In each instance an intermediary is the means through which a shipper obtains a payment which in effect reduces his transportation charges. A single governing principle is involved, and that principle is that a shipper is not permitted, through the action of an intervening third party furnishing a service or an instrument of transportation, or otherwise, by any device, to defeat tariff rates or to obtain a preference.

#### **B. Circuit Court's Erroneous Understanding of Car Mileage Tariffs.**

This suit was not brought to enforce the provisions of the rail carriers' car mileage tariffs. Rather it is a suit to recover upon a contract between a shipper and a car owning company. The plaintiff did not plead the car mileage tariffs as the source or basis of its claims. The complaint makes no reference to any tariff. The El Dorado Company's claims are based wholly upon contract. However, the Circuit Court was so misled by the contentions of the El Dorado Company that it rested its decision largely upon a mistaken understanding of the tariff provisions and their effect.

- (1) Under the Applicable Tariff Items  
the Car Mileage was not Payable  
to the El Dorado Company.

In its initial opinion the court upheld the El Dorado Company's right of recovery primarily upon the ground that under the provisions of the applicable tariffs of the

rail carriers the car mileage allowances were payable to the El Dorado Company. The car mileage tariffs do not so provide. As we have pointed out in the Statement of the Case, throughout the first fifteen months of the period covered by the suit these tariff rules provided that the car mileage allowances would be paid to the car owner or to the party who had acquired the cars as shown by the "reporting marks" (R. 192-197).<sup>1</sup> The "reporting marks" borne by the leased cars were *not* those of the El Dorado Company, but were those of the Car Corporation (R. 21). Moreover, commencing with April 1, 1935, and therefore effective during the last two months of the period in suit, the tariff rules contained a restrictive clause explicitly forbidding payment to a lessee such as the El Dorado Company. The clause reads:

"Mileage for the use of cars of private ownership will be paid for loaded and empty movements *only to the car owner—not to a lessee* \* \* \*" (R. 197)

The meaning of the tariff provisions is not open to controversy. Plainly the tariffs did not provide for the payment of the car mileage to the El Dorado Company at any time during the period embraced by the suit.

These provisions of the car mileage tariffs are set forth in plaintiff's Exhibit No. 3 (R. 191-198) and are authenticated by stipulation of counsel as the applicable provisions of the carriers' tariffs (R. 191). In its assign-

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(1) Effective after October 31, 1934, the tariff rules contained the additional requirement that the reporting marks must be those assigned by the American Railway Association and properly published in the Official Railway Equipment Register (R. 194 et seq.).

ment of errors the El Dorado Company again identified these rules as the "applicable published railroad tariffs" (R. 225, 235). Yet the Circuit Court of Appeals characterizes these tariff rules as merely "rules" of the American Railway Association (R. 347). The court has failed to understand that the "*Association rules*" are the *actual tariff rules* published and filed with the Commission in behalf of the rail carriers by "American Railway Association Tariff Bureau, B. T. Jones, Agent" (R. 192). The tariffs are identified as "Mileage Tariff No. 7-I, I. C. C. No. 2692", with numbered supplements (R. 192, 193 et seq.).

(2) Payments of Car Mileage to Car Corporation was in Compliance with Car Mileage Tariffs.

The Circuit Court has devoted a substantial portion of its opinion to the thesis that it would be a crime under the second paragraph of the Elkins Act (Appendix, p. ii), which makes it unlawful for "*any carrier*" to depart from its filed tariff rates, if the *rail carriers* were "to pay less than their established mileage rates for the cars supplied by the El Dorado Company" (R. 311, 323, 328). The error into which the court has fallen will be at once apparent when we again stress the facts:

*First*, that this suit is not brought against the *rail carriers*;

*Second*, that the suit is not brought upon the tariffs;

*Third*, that the mileage allowances were not payable to the El Dorado Company under the applicable tariffs.

There was no departure from the tariffs when the rail carriers paid the car mileage to the Car Corporation. But

there would have been a departure from these tariffs had the rail carriers paid the car mileage to the El Dorado Company.

In concluding that, under the applicable tariffs, the car mileage allowances were payable to the El Dorado Company, the Circuit Court of Appeals has in fact disregarded the provisions of these applicable tariffs specifically governing the payment of the car mileage allowances. The result is in conflict with decisions of this Court which have uniformly held that the rules contained in the published tariffs may not be disregarded or ignored. (*Davis v. Henderson*, 266 U. S. 92, 93; *Southern Ry. Co. v. Prescott*, 240 U. S. 682, 637-638; *Davis v. Cornwell*, 264 U. S. 560, 562; *Erie R. R. Co. v. Stone*, 244 U. S. 332, 335-336; and see *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50). This principle is exemplified by the following excerpt from the opinion in *Davis v. Henderson*, *supra*:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff." (266 U. S. at p. 93)

- (3) In Disregard of Record Stipulation, Circuit Court has "assumed" Existence of Tariff providing for Payment of Car Mileage to El Dorado Company.

The error of the court in interpreting the tariffs and purporting to enforce them was drawn to its attention in the petition for rehearing. Thereupon the court declared, in its supplementary opinion, that "we must assume that

the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (R. 346). This was additional error. The assumption is directly contrary to the record stipulation to which we have referred (R. 191).

In its opinion upon petition for rehearing the Circuit Court further said:

"Since there could be a crime committed under the Elkins Act only if there were no rate filed with or established by the Commission providing for the payment of compensation for the use of cars supplied by a lessee in the position of the El Dorado Company, the Car Corporation had the burden of proving that none was filed or established." (R. 345-346)

If such burden rested upon the Car Corporation, it fully sustained that burden by joining with the El Dorado Company in the record stipulation, just identified, specifically authenticating the tariff items shown of record as the applicable tariff items. Everything possible was done by petitioner and respondent to make it clear that the tariff provisions reproduced of record are the actual tariff provisions upon which the El Dorado Company has relied. Still the court failed to recognize that there was in fact no tariff providing for payment of the car mileage to the El Dorado Company.

In its supplementary opinion the Circuit Court has also criticized the answer of the Car Corporation because it "does not allege the absence of a tariff compensating the El Dorado Company" (R. 346). There was no occasion for any such allegation in the answer, since the complaint of the El Dorado Company tendered no case under the

railroad tariffs. The criticism is further unwarranted in view of the fact, heretofore repeatedly noted, that the parties *stipulated* the applicable tariff provisions, and did so in terms which precluded controversy or misunderstanding.

Plainly the Circuit Court has misunderstood the car mileage tariffs and has erred in resting its decision upon them.

### C. Respondent's "Agency" Theory.

Counsel for the El Dorado Company evolved a theory of "agency" to implement the demand for payment of the car mileage revenue in full. The contention is that the Car Corporation made itself the "agent" for the collection of the car mileage revenue for its principal, the El Dorado Company, and hence that it must pay over the car mileage revenue in full to the El Dorado Company. This theory was adopted by the Circuit Court of Appeals (R. 304, 305, 306).

We think that agency relations were not created, but, if it is to be assumed that an agency did arise, it can contribute nothing to the case for the El Dorado Company. Manifestly, a principal can recover through his agent only that which is lawfully payable to the principal. In the preceding subdivision it has been shown that, under the provisions of the applicable car mileage tariffs, the car mileage revenue was not payable to the El Dorado Company.<sup>1</sup> Hence the El Dorado Company could not recover the revenue upon the theory of agency.

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(1) Even if there had been color of tariff authority for the payment of the car mileage to the El Dorado Company—and we have shown that there was none—still

The argument is beside the point in any event. If it were possible to conceive of an agency agreement whereby a shipper is to obtain, through an intervening car owning company, payments from the rail carriers amounting to a partial remission of freight charges, the agreement would be unenforceable. It is obvious that, if the rule were otherwise, the statute could readily be circumvented by the convenient device of designating the car owning companies as the "Agents" through whom car mileage payments could be made to the shippers to defeat the published freight rates and the purposes of the Elkins Act. This was recognized by the Commission in *Use of Privately Owned Refrigerator Cars, supra*, since it condemned the payment of mileage earnings in excess of a shipper's costs whether such payments were made "direct or through car owners" (R. 160). In other words, the payment of the excess mileage earnings *through car owners*, whether designated as agents or otherwise, is objectionable because it results in a *pro tanto* reduction in the published freight rates.

The Elkins Act is a remedial statute which broadly comprehends all manner of arrangements, direct or indirect, whereby property is "transported at a less rate

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the El Dorado Company could not prevail. This Court said in *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 511:-

"Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form can not clothe it with immunity."

than that named in the tariffs published and filed by such carrier \* \* \* or whereby any other advantage is given or discrimination is practiced." (*U. S. v. Koenig Coal Co.*, 270 U. S. 512, 518, 519).

The means employed is immaterial. The device need "not be necessarily fraudulent." Unlawful intent is not a necessary ingredient of the offense. (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 71, 72.)

### III.

**THE CAR OWNER, DEFENDING ITS REFUSAL TO PAY OVER TO A SHIPPER-LESSEE THE EXCESS OF THE CAR MILEAGE PAYMENTS RECEIVED FROM THE RAIL CARRIERS ABOVE THE AMOUNT OF THE SHIPPER'S CAR RENTAL UPON THE GROUND THAT THE PAYMENT OF SUCH EXCESS WOULD VIOLATE THE ELKINS ACT, WAS NOT REQUIRED TO PLEAD AND PROVE THAT SUCH SHIPPER HAD INCURRED NO EXPENSE IN ADDITION TO THE CAR RENTAL IN CONNECTION WITH THE USE OF THE LEASED CARS. THE BURDEN WAS IN ANY EVENT SUSTAINED.**

Although the point was neither raised nor presented either in the District Court, or upon appeal, the Circuit Court of Appeals has held that the burden was upon the Car Corporation to prove that the El Dorado Company had incurred no expense, additional to the car rental, in connection with the use of the leased cars. It has further held that that burden was not discharged. (R. 308, 311.) In its opinion upon petition for rehearing the court has suggested, for the first time, that defendant's pleading

was inadequate in this regard. (R. 343-345.) Neither point was properly before the court for decision.

**A. Theory of Decision at Variance with Theory Upon Which Case Was Tried and Decided.**

- (1) The El Dorado Company neither claimed nor proved any costs additional to its car rental.
- (2) The Circuit Court has assumed facts not in evidence.

The record reveals no costs or expenses, other than car rental, incurred by the El Dorado Company in connection with the use of the cars. The entire account between the parties is in evidence as plaintiff's Exhibit No. 1 and shows no debits to the El Dorado Company other than car rental (R. 182, 183-187, inclusive). The stipulation as to facts is silent respecting any other costs or expense (R. 45). Neither in its proposed findings (R. 203-206, inclusive) nor in its assignment of errors (R. 225-286, inclusive) has the El Dorado Company advanced any claim that cost or expense in addition to the car rental was incurred. In fact, both parties presented the case in the District Court as well as in the Circuit Court of Appeals upon the basis that the car rental was the only cost to the El Dorado Company. The case was decided by the District Court upon that basis. Under well-settled principles the parties could not, and they did not, adopt a different theory of the case in the Circuit Court of Appeals. Neither party will be heard in an appellate court to question facts whose existence was assumed without objection in the trial court and on which assumption the trial court proceeded without objection in deciding the

case. (*U. S. v. Atkinson*, 297 U. S. 157, 159-160; *General Utilities Co. v. Helvering*, 296 U. S. 200, 206-207; *McCandless v. Furlaud*, 293 U. S. 67, 74; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 306; *Brown v. Gurney*, 201 U. S. 184, 190; *Panama City v. Federal Reserve Bank of Atlanta*, (C.C.A. 5th) 97 Fed. (2d) 499, 500; *Bovay v. Fuller* (C.C.A. 8th), 63 Fed. (2d) 280, 284; *Sacramento Suburban Fruit Lands Co. v. Melin*, (C.C.A. 9th) 36 Fed. (2d) 907, 909; *Arkansas Anthracite Coal & Land Co. v. Stokes* (C.C.A. 8th), 2 Fed. (2d) 511, 515.)

No issue as to additional costs, either actual or conjectural, was ever suggested until the Circuit Court of Appeals, upon its own initiative, raised it in its opinion (R. 308). The court, and not the El Dorado Company, tenders the suggestion that the monthly rentals did not establish the El Dorado Company's costs. The court, and not the El Dorado Company, argues that the Car Corporation had the burden of proof and failed to meet it. In support of its conclusion that the car rental did not establish the El Dorado Company's costs, the court offers a purely speculative analysis of costs and "possible liabilities" to which the El Dorado Company might have been subject (R. 310). None of these hypothetical costs has record support and in some important respects they are demonstrably contrary to fact.<sup>1</sup>

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(1) For example: (a) The court assumes that the El Dorado Company "must provide trackage facilities" for the storage and switching of the cars (R. 310). This is without support in the contract or otherwise in the record. The Commission pointed out in *Use of Privately Owned Refrigerator Cars* that "Private cars, when held

If a party may not upon appeal change its theory of the case, it must logically follow that the Circuit Court of Appeals is not free to formulate a new theory of the case, and, in doing so, to assume a state of facts for which there is no support in the record. This must particularly be so where the court proceeds to assume facts which are at variance with what was presented to the trial court. The result is that the Circuit Court of Appeals has here reversed the trial court on a point not ruled upon or submitted for ruling, or even assigned as error. The District Court cannot be held guilty of error in a ruling which it

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for loading, are stored on the tracks of the carriers \* \* \* (R. 150). (b) The court says that the El Dorado Company "has the current cost of their administration" (i.e., of the cars) (R. 310). If this is a reference to maintenance and repairs, it will suffice to point out that the Car Corporation is expressly obligated by the contract to maintain and repair the cars (R. 24-25). (c) The court states that the El Dorado Company "has the cost of cleaning the cars." (R. 310). The record does not so indicate. (d) The court says, contrary to the fact, that the cocoanut oil is "both inflammable and explosive and the contents may destroy the cars" (R. 310). (e) The court raises the possibility that the plant might suspend operation during the remainder of the lease so that the "rental costs for supplying the cars for 18 months may be the total 36 month obligation under the lease" (R. 311). Yet testimony given by an officer of the El Dorado Company at the trial, only two months before the expiration of the three-year lease, was to the effect that since the middle of 1934 the Car Corporation had continued to credit the El Dorado Company with a sufficient amount of the mileage earnings to offset all rental costs (R. 172).

A purely conjectural analysis of "possible" costs and liabilities of this variety, many of which are directly contrary to the record, is patently unwarranted.

never made nor had occasion to make (*Commercial National Bank v. Reber* (C.C.A. 3rd), 74 Fed. (2) 301, 302).

In *McCandless v. Furlaud*, *supra*, the Circuit Court of Appeals had reversed a judgment of the District Court on the ground that the plaintiff lacked legal capacity to sue. One of the assignments of error was directed to an alleged holding of the District Court that the plaintiff had such capacity but, as this Court observed,

“ \* \* \* the record does not show that the District Court did so rule; or that it was requested to rule on the subject.” (293 U. S. at p. 73.)

The judgment of the Circuit Court of Appeals was there reversed upon the ground that it had erred in reversing the decision of the trial court on a ground which had not been presented to that court. In the course of its opinion this Court said:

“The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court.” (293 U. S. at p. 74.)

The error of the Circuit Court of Appeals in the present case is the more apparent, since the supposed defect of proof was not suggested by the El Dorado Company at any time, either in the District Court or before the Circuit Court of Appeals.

#### **B. The Car Corporation's Burden of Proof Fully Discharged.**

Although the El Dorado Company has at no time raised the issue of burden of proof as to additional costs, never-

theless the Car Corporation's burden of proof was fully sustained. The record shows that the car mileage earnings were more than double the car rental during the period in suit. The excess amounted to more than \$25,000, or approximately \$27.50 per car per month (Statement of the Case, *supra*, pp. 7-8). The Circuit Court suggests, however, that the excess already accrued might have been offset by the failure of the cars to earn any mileage during the last eighteen months of the three-year lease (R. 311). The suggestion is not only unwarranted; it is foreclosed by the evidence. Although the amount by which the car mileage earnings exceeded the car rental during the last eighteen months of the lease does not appear of record, the testimony of an officer of the El Dorado Company (R. 171-172) shows that after the middle of the year 1934 (when the Car Corporation ceased crediting the excess car mileage) the El Dorado Company "was credited thereafter with such proceeds of the mileage earnings as were equal to the rental or car hire reserved in the contract of September, 1933." The El Dorado Company has actually paid nothing by way of rental either since the summer of 1934 (R. 172) or prior thereto (R. 177-178). It thus appears that the El Dorado Company was credited with car mileage earnings in amounts sufficient to offset all rental costs throughout the entire period of the three-year lease up to the date of the trial, October 28, 1936 (R. 39), two months before the expiration of the lease. Such is the showing for 34 months out of the total contract period of 36 months.

Not only were the car mileage earnings shown to be more than double the car rental during the period in suit,

but it is shown in addition that the cost of maintenance and repair of the cars was borne by the Car Corporation and not by the El Dorado Company (R. 24-25, 177). The only reasonable inference that can be drawn from these facts is that the car mileage earnings were far in excess of the car rental and any other "actual expense" which might conceivably have been incurred by the El Dorado Company, and that the payment of this excess to the El Dorado Company would, therefore, accomplish an unlawful rebate.

The payment by a car owner to a shipper-lessee of car mileage earnings so greatly in excess of car rental cannot be justified upon the merely speculative assumption that the lessee might have incurred, or might in the future incur, additional costs equal to the amount of such earnings. Even in a criminal prosecution for unlawful rebating in violation of the Elkins Act, the government is not required to offer proof excluding possibilities of such a remote character. (*Vandalia R. Co. v. U. S.*, (C.C.A. 7th) 226 Fed. 713, 717; certiorari denied, 239 U. S. 642). Yet such is the burden which the views expressed in the opinion of the Circuit Court of Appeals would impose upon the Car Corporation.

If the views of the Circuit Court as to the burden of proof should prevail, a fertile field would be provided for collusion between shippers and car owning companies toward the covert accomplishment of the results forbidden by law. The car owning companies could safely credit favored shippers with the full car mileage payments received from the rail carriers, no matter how greatly they exceeded the car rental, confident that any charge

of rebating could be met with the plea that there was nothing to show that the shipper might not have incurred additional costs sufficient to offset the excess of the car mileage payments. Thus the efforts of the Commission to put an end to rebating and discrimination through the use of privately owned cars would be effectually frustrated.

A concept as to burden of proof which would permit such results is contrary to fundamental principles of the law of evidence. It is obvious that if the El Dorado Company had incurred any costs or expense additional to car rental the facts would have been within its knowledge. They could not have been within the knowledge of the Car Corporation. In such a case, where there is proof of circumstances tending to support the contention of the party having the burden of proof, the other party, who is in a position to offer evidence of all the facts and circumstances as they existed, must produce such evidence. If he fails to do so, his silence must be taken against him and it must be concluded that the facts do not support his cause. (*Selma, Rome & Dalton R. R. Co. v. U. S.*, 139 U. S. 560, 567-568; *Graves v. U. S.*, 150 U. S. 118, 120-121; *Runkle v. Burnham*, 153 U. S. 216, 225; *U. S. v. Denver & R. G. R. R. Co.*, 191 U. S. 84, 91-93; *Henderson v. Richardson Co.*, (C. C. A. 4th) 25 Fed. (2d) 225, 228; *American Lead Pencil Co. v. Gottlieb & Sons*, 181 Fed. 178, 181; *Kyle v. Wadley*, 24 F. Supp. 884, 886; *Merriam v. Venida Blouse Corp.*, 23 F. Supp. 659, 660-661.) Since the El Dorado Company offered neither claim nor proof of any additional costs, the Circuit Court of Appeals erred in concluding that the Car Corporation failed to sustain its burden of proof.

### C. Defense Adequately Pleaded.

The answer of the Car Corporation raised a legal defense to the cause of action asserted by the El Dorado Company. It averred that if it should pay over to respondent El Dorado Company any part of the mileage payments received from said common carriers by defendant, as the owner of said cars, in excess of the car hire or rental reserved in said agreement, such credit and payment would be unlawful in that . . . (the El Dorado Company) . . . would secure the transportation of property at rates less than the rates named in the published and filed tariffs of said common carriers applicable to such transportation,<sup>1</sup> thereby obtaining a rebate or concession and an advantage or discrimination, in violation of the provisions of said Elkins Act" (R. 18). Thus it pleaded the ultimate fact. The plea satisfied principle and precedent alike. It served fully to acquaint the adversary and the court with the nature of the defense relied upon.

At no time, in either the District Court or in the Circuit Court of Appeals, was the adequacy of the plea challenged by the respondent El Dorado Company. It was fully understood that the Car Corporation was contending that, by the payment to respondent El Dorado Company of any part of the excess car mileage earnings which had been withheld by the Car Corporation, the El Dorado

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(1) While the Circuit Court of Appeals in its opinion upon petition for rehearing sets forth a part of the Car Corporation's plea, it has omitted that portion which is italicized above (R. 344).

Company would secure the transportation of its property at less than the tariff rates.

In respondent El Dorado Company's opening brief filed with the Circuit Court of Appeals it was stated (p. 10):

"The sole question at issue is whether appellee was prohibited by the cited provisions of the Elkins Act from making the said payments according to the terms of its said contract—that is to say, whether such payments, if made, would amount to a rebate, a concession, an advantage or a discrimination prohibited by the cited provisions of the Elkins Act. (R. 43, 44.)"

Again, upon page 12 of the same brief for respondent, it was stated that

"The sole question involved is directly raised by the pleadings."

In his opening argument before the Circuit Court of Appeals counsel for the El Dorado Company stated (Tr. of Oral Argument, p. 5):

"Now, the whole question, therefore, hinges upon whether or not the payment contracted to be made by the tank car company is a violation of the provisions of the Elkins Act. *It is raised first, on the face of the answer and, second, on the face of the record.* The court held that it was."

Upon its own initiative the Circuit Court of Appeals has questioned the adequacy of the plea, and has done so only in its opinion upon petition for rehearing (R. 344). Even if the court could properly initiate this point, it is plain that the plea was adequate. This Court has held that even in an indictment under the Elkins Act it is suf-

ficient to plead the offense in the language of the statute and that such pleading is good, at least in the absence of demurrer (*Armour Packing Co. v. U. S.*, 209 U. S. 56, 83-84; and see *U. S. v. Chicago St. P. and O. Ry. Co.*, 151 Fed. 84, 86, aff'd. 162 Fed. 835, cert. den. 242 U. S. 579; *Vandalia R. Co. v. U. S.*, *supra*, 226 Fed. at p. 716).

The plea of the Car Corporation and, alike, the conclusions of the District Court, properly set forth the ultimate fact that payment to the respondent El Dorado Company of the excess of the car mileage earnings over rental would result in the latter's receiving transportation at less than tariff rates (R. 18, 35). Nothing more was needed. It is now too late in any event to raise any question as to the form of the findings and conclusions (*O'Reilly v. Campbell*, 116 U. S. 418, 421).

### CONCLUSION

The decision under review is opposed to precedent and principle alike. It is irreconcilable with decisions in all other cases arising under cognate circumstances. It fails to conform with the generic rule repeatedly announced by this Court that when the full performance of a contractual obligation will produce results in conflict with a governing statute the contract must yield to the statute. In relation particularly to the Elkins Act, it announces a doctrine which is discordant with the consensus of judicial expression throughout the history of this law.

If this decision should stand as an authoritative statement of the law, it would accord judicial sanction to the

use of privately owned cars as a means by which shippers may avoid the prohibitions of the Elkins Act against rebates, concessions, preference and discrimination.

It is submitted that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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## Appendix

### STATUTORY PROVISIONS INVOLVED.

Elkins Act, §1, par. 1 and 2:

“That \* \* \* it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. \* \* \*

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act." Act of Feb. 19, 1903, 32 Stat. 847, c. 708, as amended by Act of June 29, 1906, 34 Stat. 587, c. 3591; 49 U. S. C. §41(1) and (2).

**Interstate Commerce Act, §1(3):**

"The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Act of Feb. 4, 1887, 24 Stat. 379 c. 104, as amended, by Act of June 29, 1906, 34 Stat. 584, c. 3591, by Act of June 18, 1910, 36 Stat. 545, c. 309, by Act of Feb. 28, 1920, 41 Stat. 474, c. 91, and by Act of June 19, 1934, 48 Stat. 1102, c. 652; 49 U. S. C.

**Car Service Amendment of 1917,**

**Interstate Commerce Act, §1(10), (11), (13) and (14):**

"10. The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this part, including the compensation to be paid for the use

of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices." Act of May 29, 1917, 40 Stat. 101, c. 23, as amended by Act of Feb. 28, 1920, 41 Stat. 476; c. 91; 49 U. S. C. §1(10), (11), (13), and (14).

**Interstate Commerce Act, §6(1):**

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in

large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." Act of Feb. 4, 1887, 24 Stat. 380, c. 104, as amended by Act of Mar. 2, 1889, 25 Stat. 855, c. 382, by Act of June 29, 1906, 34 Stat. 586, c. 3591, and by Act of Feb. 28, 1920, 41 Stat. 483, c. 91; 49 U. S. C. §6(1).

**Interstate Commerce Act, §15(13):**

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U. S. C. §15(13).



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

No. 129.

GENERAL AMERICAN TANK CAR CORPORATION, a corporation,  
*Petitioner,*

v.

EL DORADO TERMINAL COMPANY, a corporation, *Respondent.*

**REPLY BRIEF OF GENERAL AMERICAN TANK CAR  
CORPORATION, PETITIONER.**

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Dated at Washington, D. C., December 9, 1939.



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### STATUTES.



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**REPLY BRIEF OF GENERAL AMERICAN TANK CAR  
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**INTRODUCTORY.**

**Factual Matters.**

The brief for respondent does not challenge the accuracy of the factual presentation in petitioner's opening brief. Neither is there any criticism on the score of completeness. The following circumstances are significant:

- (1) Respondent does not deny that in the period of 17 months covered by the suit the car mileage earnings of the cars leased to the El Dorado Company were approximately twice the car rental. In other words, the

excess of the car mileage over the car rental was approximately \$27.50 per car per month.

(2) Respondent makes no claim that the El Dorado Company has in fact sustained any costs, additional to car rental, in the use of the leased cars.

### **"Assumptions."**

It is suggested in respondent's brief that petitioner has made "assumptions contrary to the stipulated facts" (Brief for respondent, p. 51). Respondent fails to particularize. In point of fact petitioner has made no assumptions in conflict with the facts of record but has scrupulously adhered to such facts.

The Circuit Court, on the other hand, has indulged numerous assumptions which were not only without record support but which were contrary to the record. For example,

(1) The Court erroneously assumed that the car mileage tariffs authorized payment of the car mileage to the El Dorado Company (Opinion, R. 324, 329). When the error was brought to its attention, the Court in express language declared that "we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company" (Opinion, R. 346). This assumption was contrary to a record stipulation, as we have shown (Petitioner's opening brief, pp. 54-55).

(2) The Court assumed that the El Dorado Company had incurred various elements of cost. The error in these assumptions was pointed out upon pages 60 and 61 of our opening brief. Respondent does not attack the analysis there made.

Respondent has sought to defend the latter of these two erroneous assumptions. It has largely ignored the for-

mer. Plainly it cannot defend or excuse either without overlooking its own contribution to the record and repudiating its record stipulation as to the applicable tariff items. (R. 191.)

### A.

#### THE PRIVATE CAR AS A MEANS OF REBATING OR PREFERENCE.

The petitioner's case is rested upon the principle that while the private car may be used, with the carrier's consent, in interstate commerce, it may not be used in such fashion as to avoid the prohibitions of the statute against rebating or discrimination in any form.

The contention of respondent, on the other hand, is that the user of a private car is entitled to such financial gains and other advantages as he can contrive to secure thereby. Respondent's theory is that the law is not concerned either with the amount of the financial gain to a particular shipper or with the resulting differences in the transportation costs borne by the shippers.

Neither upon principle nor upon authority can any support be found for the views thus advanced on the part of the El Dorado Company. The El Dorado Company bluntly declares that.

"It is of no legal importance that such payment might result in a profit or advantage to respondent" (Brief for respondent, p. 32).

Respondent relies upon an expression from the opinion of this Court in

*I. C. C. v. Duffenbaugh*, 222 U. S. 42, 46, reading

"The law does not attempt to equalize fortune, opportunities or ability."

According to our view respondent has misapprehended what this Court had in mind. The quoted

statement is properly to be viewed in its context and in relation to the facts which were there before the Court. Clearly this Court cannot be understood to have implied that if the shipper succeeds in making a contractual arrangement with a car-line company from which he can derive an indirect remission of transportation charges or a concession in some other form, such is merely his good fortune. In express terms this Court has disclaimed such intent or meaning. Rejecting a contention of similar purport, relating directly to claimed advantages in the use of private cars, this Court said in

*The Assigned Car Cases*, 274 U. S. 564,

"Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunity. *The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service.* . . . The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive of self-interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service. Compare *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 523, 524; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663-665." (pp. 583-4) (Emphasis supplied.)

See also

*Ellis v. I. C. C.*, 237 U. S. 434, 445.

Additional authority is not needed to make it clear that this Court has never given its sanction to private car arrangements resulting either in financial gain or in preference to the user.

## B.

**THE SHIPPER'S "PROFIT" AS A REBATE.****(1) Propriety of Profit to the El Dorado Company.**

The El Dorado Company is under the necessity of contending that, if it can realize a monetary profit out of the excess of the car mileage earnings over the costs incurred in the use of the leased cars, this is a "profit to which it is entitled under the terms of the lease contract" (Brief for respondent, p. 44). It is under the necessity of arguing further that such profit, although derived from the car mileage paid by the carriers to the Car Corporation, has "nothing to do with transportation" (Brief for respondent, p. 43). In order that there may be no question that we correctly characterize the contentions of the El Dorado Company in this behalf, we quote from respondent's brief as follows:

"This was purely a profit on the car lease contract, to which no carrier was a party, and not a reduction in the freight rates paid." (Brief for respondent, p. 36.)

"If, as petitioner contends, such payment would yield a profit to the El Dorado Company it was a profit resulting from the lease and having nothing to do with transportation." (Brief for respondent, p. 43.)

The position thus taken by the El Dorado Company was sustained by the Circuit Court which expressly declared that "Such profit does not constitute a rebate prohibited by the Act" (Opinion, R. 311).

Thus we have clearly revealed the unwillingness of the El Dorado Company and alike the Circuit Court to recognize the true significance of the profits realized by a shipper-lessee out of an arrangement with a car owning company for the use of privately owned cars.

To state the contention of the El Dorado Company is to answer it. It is true that, *in form* the profit arises "out of the lease contract," but *in substance* the profit operates to

reduce the shipper's transportation costs below the published freight rates. The shipper is the financial gainer in the amount by which the car mileage earnings, received from the rail carriers by the car owning company and paid over by the latter to the shipper, are in excess of the shipper's car rental and incidental costs, if any there should be.

We need not extend the discussion. The point has been fully developed in petitioner's opening brief (pp. 20-51). Without conflict it has been ruled in the cases heretofore decided that it is not permitted to a shipper-lessee, by arrangement with a car owning company, to enjoy a monetary profit out of the excess of car mileage earnings over the costs incurred by the shipper in the use of the leased cars. Such profit has been condemned because it constitutes in fact, and therefore in law, a *pro tanto* reduction in the lawful freight charges.

## (2) Participation or Knowledge of Rail Carriers.

The El Dorado Company argues that there can be no unlawful rebate without participation by common carriers in the arrangement or understanding. The following is quoted from page 13 of respondent's brief:

"Of necessity such a rebate or concession could only be made if the carrier directly or indirectly participated in the arrangement or understanding."

The law is plainly to the contrary, as shown by the opinion of the Court in

*U. S. v. Koenig Coal Company*, 270 U. S. 512, 518, 519.

Neither in *I. C. C. v. Reichmann*, 145 Fed. 235, nor in *Spencer Kellogg & Sons v. U. S.*, 20 Fed. (2d) 459, did it appear that the common carrier participated in or even had knowledge of the arrangement whereby the shipper received a concession. In neither case did the carrier receive less than its tariff rates nor was there failure on the part of the carrier to adhere to the provisions of its tariffs respecting the payment of allowances. In each instance the

arrangement was between the shipper and an intervening third person, viz., a car owning company in the one case and a grain elevator company in the other case. By each decision it was ruled specifically that the shipper may not lawfully receive from the intervening agency, furnishing either a facility or a service of transportation, any payment which operates to reduce the shipper's transportation costs.

Directly pertinent is the following excerpt from the opinion of this Court in *Ellis v. I. C. C.*, *supra*.

"We have stated the nature and object of the investigation, and it is to be observed that not every advantage that may enure to a shipper as the result of the position of his plant, his ownership or his wealth is a preference. *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42, 46. *But the intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by § 15.* The supposed unreasonable charge may be used as a device to attain the forbidden end and therefore reasonable latitude should be allowed to see if any such device is used. *Interstate Commerce Commission v. Brimson*, 154 U. S. 446, 464." (P. 445) (Emphasis supplied.)

It has long been settled that neither participation nor knowledge on the part of the common carrier is necessary in order to constitute the offense of rebating. The law is concerned with results, and not merely with the means of their accomplishment.

### (3) Disposition of Car Mileage Payments by Car Corporation.

The El Dorado Company offers this further contention:

"What the car corporation, *having nothing to do with transportation*, might do with money paid to it for the furnishing of the cars was in no manner covered by the Elkins Act or other provisions of the Interstate Commerce Act." (Brief for respondent, p. 16.) (The emphasis is that of the El Dorado Company.)

T's argument has been answered in the immediately preceding discussion. If it were true that the law is not concerned with the disposition of the car mileage earnings received by the Car Corporation from the rail carriers, the private car would be a favored instrument of rebating and preference. The car owning companies could freely bargain with their shipper-lessees as to the division of the car mileage received from the rail carriers, regardless of the resulting profit to the shippers and regardless of diversity in the terms extended to the several shippers. Thus the law would be impotent to reach rebating and discrimination through the use of private cars.

#### **(4) Materiality of Payment of Freight Charges to Carriers at Tariff Rates.**

The El Dorado Company contends that since freight charges upon its shipments were paid to the carriers in full at the rates published in the freight tariffs, and since the mileage allowance was paid to the Car Corporation by the carriers at the rate provided in the mileage tariffs, no rebate, concession or discrimination could result (Brief for respondent, p. 169). Thus the respondent again misses the issue. It is not that the common carrier has departed from its tariffs. The question is rather whether the shipper-lessee has obtained a rebate or concession through the payment made to him by the car owning company out of the car mileage received by the latter from the rail carriers.

It appears to be respondent's theory that the prohibitions of the Elkins Act are directed merely against tariff departures on the part of the carriers. In other words, respondent seems to argue, and repeatedly, that there can be no violation of the Elkins Act as long as the carrier receives its full tariff rate (Brief for respondent, pp. 15, 16, 30, 31, 32, 36, 43). Plainly this is not the law. It may be, and often is, the case that a shipper is the beneficiary of an illegal rebate or concession even though the car-

rier can not be charged with any deviation from its tariff rate.

Freight charges were paid in full to the carriers at tariff rates in the *Spencer Kellogg* case and in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (R. 49-162). Allowances were also made by the carriers in each of these cases in accordance with tariff provisions. But these circumstances did not save the questioned transactions from the condemnation of the law.

The El Dorado Company's contention that there can be no violation of the Act as long as tariff rates are paid in full in the first instance is completely answered by the following excerpt from the opinion in—

*Vandalia R. Co. v. U. S.*, 226 Fed. 713; Cert. den. 239 U. S. 642:

"The statute evidently aims to prohibit, not only discrimination as between shippers, but departure from the tariff rates, irrespective of its actual discriminatory effect. The history of this legislation demonstrates that both discriminations and rebates have ever been sought to be hidden under the most subtle disguises. Every device that seeks to cover up either a rebate or a discrimination in interstate transportation is denounced by the statute, provided only, as to a rebate, that thereby the property is actually transported at less than the tariff rate. *That the full tariff rate is collected at the time of transportation does not negate the possibility of a rebate in respect thereto. The rebate may be in a lump cash sum in advance (United States v. Union Stockyards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226), or by later or earlier indirect payments (G. R. & I. Ry. Co. v. United States, 212 Fed. 577, 129 C. C. A. 113).*" (p. 716) (Emphasis supplied.)

It is not a matter of consequence, although the respondent apparently entertains a contrary view, that the freight charges on the shipments of the El Dorado Company were generally paid by the consignees rather than by the El

Dorado Company itself (Brief of respondent, p. 31). It is not the law that a rebate can occur only when the payment is made to the party who has actually paid the freight charges.

*Northern Central Railway Co. v. United States*, 241 Fed. 25.

The El Dorado Company has sought, by resort to a variety of reasons, to justify its contention that, as a shipper-lessee of privately owned cars, it is properly entitled to enjoy such profits as may be derived from the excess of the car mileage earnings over expenses incurred in the use of the leased cars. We can find merit in none of the reasons which it has advanced. The position which the El Dorado Company has been compelled to take as to the propriety of "profit" from its lease contract is, we believe, inherently incapable of defense.

### C.

#### THE CAR MILEAGE TARIFFS.

Respondent has hardly put forth a serious effort to defend the Circuit Court's treatment of the car mileage tariffs. It is plain that the Circuit Court mistakenly understood that the car mileage tariffs provided for payment of the car mileage to the El Dorado Company. Its decision was rested largely upon that understanding. We have noted that, in its supplemental opinion, the Circuit Court expressly declared that "we must assume that the applicable tariff is for the compensation of such a lessee-supplier as the El Dorado Company." (Opinion, R. 346.) Such assumption is flatly in conflict with the record.

Respondent concedes, as it must, that

"The tariff provisions for the payment of mileage allowances for the furnishing of cars were stipulated on the trial and are set out at pages 192 to 197, inclusive, of the record." (Brief for respondent, p. 29.)

Respondent also concedes, and in fact declares, that "the carriers properly paid to the car corporation the stated mileage allowances for the use of the tank cars under lease to the El Dorado Company." (Brief for respondent, p. 37.)

These tariff provisions did not authorize payment of the car mileage to the El Dorado Company at any time during the period covered by the suit. During the last two months the tariffs expressly prohibited the payment of car mileage to a shipper-lessee (Petitioner's opening brief, pp. 52).<sup>1</sup>

Respondent is in error in its assertion that the Commission fixed the mileage rate at 1½ cents per mile (Brief for respondent, p. 27). The Commission did not fix the rate, but the fact is plainly immaterial. Neither is it of any consequence that the rate has not been held unreasonable. There has been no issue either as to the existence of the rate or as to its reasonableness. The fact is that, under the tariff rules, the car mileage was at no time payable to the El Dorado Company.

We are content to rest upon the discussion of the car mileage tariffs in the petitioner's opening brief (pp. 51-56).

#### D.

#### THE AGENCY THEORY.

Respondent undertakes briefly to defend the "agency theory" but without apparent show of conviction (Brief for respondent, pp. 39-40). The contract sued upon was not one of agency. The complaint does not allege agency relations.

<sup>1</sup> Respondent is in error in representing that the tariff rule expressly prohibiting payment to a shipper-lessee "became effective after the claims sued upon in this action had matured." (Brief for respondent, p. 39.) The fact is, and it was stipulated, that the amount in controversy includes the car mileage payments collected from the railroads by petitioner "up to the 31st day of May, 1935" (R. 46). This tariff rule, which became effective April 1st, 1935, was therefore in force during two months of the period.

# MICRO CARD

TRADE MARK 

22

39



1172

65



We have pointed out that the concept of agency cannot aid the case for the El Dorado Company. The law could not be thwarted by the designation of a car owning company as an "agent" through whom a shipper may secure moneys which are not payable to him under the tariffs, thereby accomplishing an indirect remission of the shipper's freight charges (Petitioner's opening brief, pp. 56-58).

### E.

## THE EL DORADO COMPANY'S COSTS; BURDEN OF PROOF; PLEA IN DEFENSE.

### (1) The Record Showing as to Costs.

In our opening brief we undertook to show

(a) That the record reveals no cost or expense, other than car rental, incurred by the El Dorado Company in connection with the use of the cars;

(b) That at no time did the El Dorado Company make any claim or proof of costs other than car rental;

(c) That both parties presented the case in the District Court as well as in the Circuit Court upon the basis that the car rental was the only cost to the El Dorado Company.

(Petitioner's opening brief, pp. 59 *et seq.*)

Even at this time the respondent interposes no real challenge to the foregoing. While we find some observations in respondent's brief respecting *possible* costs and liabilities, it is significant that nowhere is there a categorical statement that the El Dorado Company has paid any additional cost *in fact*. The El Dorado Company does not deny that it made neither claim nor proof of other costs. Theoretical or conjectural costs can claim no standing as realities.

The El Dorado Company impliedly admits that the car mileage earnings exceed its costs, since its announced objective, as heretofore noted, is to recover "the profit to

which it is entitled under the terms of the lease contract?" Brief for respondent, p. 44).

We have cited authorities to the principle that neither party will be heard, in an appellate court, to question a state of facts which was accepted without objection in the trial court and upon which the trial court proceeded to decide the cause. (Petitioner's opening brief, pp. 59, 60.)

Respondent has not questioned the authority of the cited cases, nor has it presented countervailing authorities.

Upon its own initiative the Circuit Court raised the issue of possible additional costs. This, we respectfully urge, was error. The Circuit Court was not free to formulate a new theory of the case and, in doing so, to assume a state of facts, without record support. Neither is a court of error authorized to reverse a trial court for supposed error which it did not make, and which it could not have made because the point was never presented for ruling. Without conflict the cases so hold. (Petitioner's opening brief, pp. 60-62.)

Respondent is again unable to offer opposing authorities.

## (2) Burden of Proof Discharged.

The Car Corporation's burden of proof was fully discharged. The stipulation of facts and the accounts between the parties show the car rental figures, and they also show the car mileage earnings in twice the amount of the rental. It was shown that the expenses of maintenance and repair of the cars were borne by the Car Corporation. This showing, comprehending everything within the command of the Car Corporation, made out a *prima facie* case. Nothing more was needed in the absence of countervailing evidence.

If the El Dorado Company had actually incurred any other costs, the facts were peculiarly within its knowledge. It is foreclosed by its failure to produce the evidence, if any there was, which was presumptively available to it alone. The cases so hold. (Petitioner's opening brief, pp. 62-65)

Respondent cites no case in opposition.

### (3) The Plea in Defense.

The answer of the Car Corporation raised a legal defense, predicated upon the Elkins Act. The plea satisfied principle and precedent. The defense was clearly disclosed.<sup>1</sup>

The El Dorado Company at no time questioned the adequacy of the plea, either in the trial court or upon appeal. Upon its own initiative, the Circuit Court has criticized the plea, and has done so only in its opinion denying the petition for rehearing. Even if the Circuit Court could properly raise the point, we have shown that the plea was adequate. (Petitioner's opening brief, pp. 66-68.)

The parties were agreed both in the District Court and in the Circuit Court of Appeals that the case presented a single issue of law, raised by the plea in defense predicated upon the Elkins Act. Counsel for the El Dorado Company repeatedly so stated. (Petitioner's opening brief, p. 67.)

This issue of law alone was properly before the Circuit Court. Respondent has failed to justify the course followed by the Circuit Court in raising issues of its own. Neither upon principle nor upon authority can the rulings of the Circuit Court upon the issues so raised be sustained. Respondent has presented nothing of moment to that end.

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<sup>1</sup> Respondent makes the surprising statement that the matter of cost and profit to the supplier "was injected by petitioner in the Circuit Court of Appeals in support of its argument that the payment by petitioner, according to its agreement, of the mileage allowance received by it from the carriers for the furnishing of tank cars would amount to a rebate or discrimination." (Brief for respondent, p. 34.) This is wholly misleading. This matter of "cost and profit" was necessarily raised by the plea in defense. It was the subject of evidence in the District Court and the issue was fully briefed and argued in that court.

F.

**THE CONTROLLING CASES.**

We have cited and reviewed the controlling cases (Petitioner's opening brief, pp. 27-51). Respondent offers comment upon these several decisions but in each instance fails to observe the essential holding.

**(1) Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323.**

Respondent appears to understand that we rely upon the "order" of the Commission in the case here cited (Brief for respondent, p. 21). This is erroneous. We have endeavored to make it clear that our reliance is upon the requirements of law as declared by the Commission in its report.

Respondent states that the Commission entered an order requiring the carriers "to cancel the schedules covering mileage allowances applicable to the use of refrigerator cars." (Brief for respondent; p. 23.) This again reveals a mistaken understanding of the Commission's action. The Commission's order merely required the cancellation of certain newly published rules, which had been suspended during the pendency of the investigation, without prejudice to the publication of amended rules in conformity with the Commission's findings. The Commission's report is of moment here because of its declaration that arrangements may not lawfully be made between car owning companies and shipper-lessees whereby the latter receive car mileage earnings, collected by the car owning companies from the rail carriers, in amounts exceeding the shipper's costs. Such excess payments were condemned as unlawful rebates.

True, the Commission's express findings were necessarily restricted to refrigerator cars, but the Commission properly declared that its conclusions were applicable alike to all other types of private cars. Plainly a practice which was

found to be unlawful in relation to privately owned refrigerator cars must be equally unlawful in relation to privately owned tank cars. The requirements of law do not vary with differences in the types of cars.

As we have shown in our opening brief (pp. 34-35) there is nothing in respondent's contention that the carriers do not "obligate" themselves to furnish tank cars. It appears from the Commission's report in the *Private Refrigerator Car* case that the carriers do not furnish refrigerator cars to meat packers. Yet the Commission condemned the payment of car mileage "to shippers, including meat packers" in amounts exceeding their costs (R. 160). Upon occasion the carriers do supply tank cars to shippers for the transportation of vegetable oils (R. 164-168). The point is irrelevant in any event because the statute controls practices in relation to *all* cars, "irrespective of ownership", and therefore precludes the employment of privately owned tank cars as instruments of rebating or discrimination.

**(2) I. C. C. v. Reichmann, 145 Fed. 235.**

The decision in the *Reichmann* case condemns any arrangement between a car owning company and a shipper whereby the latter receives a part of the car-mileage paid by the rail carriers to the car-line company with a resulting indirect remission of freight charges. (Petitioner's opening brief, pp. 38-46.)

Contrary to respondent's statement (Brief for respondent, p. 47) it does not appear that these cars had been leased to the rail carriers. They were merely furnished to the carriers upon order. Whether or not a lease were made would be wholly without consequence. The evil at which the decision strikes is the payment to the shipper of car mileage earnings received by the car owning company from the rail carriers with the result that the shipper enjoys a

monetary profit which in effect reduces his freight charges below the lawful tariff rate.<sup>1</sup>

**(3) *Spencer Kellogg & Sons v. U. S.*, 20 Fed. (2d) 459.**

Attempting to distinguish the holding in the *Spencer Kellogg* case, respondent states that the grain elevator company "was itself an interstate carrier." (Brief for respondent, p. 49.) Such was not the case. The elevator company was not an interstate carrier. True, the elevator company rendered a service of transportation, just as here the Car Corporation furnishes an instrument of transportation. The practice condemned as unlawful was the payment to the shipper, by the intervening agency, of moneys received from the rail carriers, with the result that the shipper's freight charges were reduced below the lawful freight rates. As the Court there pointed out, the Elkins Act is "applicable to any person or corporation who might be in a position to commit an act which would accomplish the forbidden result . . ." (20 Fed. (2d) at p. 461.)

The essential principle of the decision is applicable here (Petitioner's opening brief, pp. 46-50).

<sup>1</sup> Respondent states that in the *Reichmann* case

"The District Court did not there consider the portion of the Elkins Act relied upon by the car corporation in its defense in this action, and under which a deviation by the carrier from its published tariffs was made a criminal offense." (Brief for respondent, p. 45)

This statement is erroneous in two respects. In the first place, the court in the *Reichmann* case quoted (145 Fed. at pp. 240, 241) and based its decision upon the precise provision relied upon by petitioner. In the second place, that provision is not the second paragraph of the Elkins Act under which a deviation by the carrier from its published tariffs is made a criminal offense. The provision upon which petitioner relies is the broad prohibition of the first paragraph of the Act against rebates by "any person, persons, or corporations" whereby property is transported at less than tariff rates.

The decisions upon which the Car Corporation relies are pertinent and, according to our view, entirely conclusive of the major issue. Respondent has failed to distinguish them. On its part respondent has been unable to produce a single authority from which it is possible to draw even an inference in support of its contentions.

### CONCLUSION.

The burden of respondent's argument is that it should not be "deprived of the profit to which it is entitled under the terms of the lease contract" (Brief for respondent, p. 44). It declares that "It is of no legal importance that such payment" (i. e., the excess of the car mileage over car rental) "might result in a profit or advantage to respondent" (Brief for respondent, p. 32).

The Circuit Court accepted respondent's contention. It declared that "Such profit does not constitute a rebate prohibited by the Act" (Opinion, R. 311). The ruling is directly hostile to the terms and purpose of the statute.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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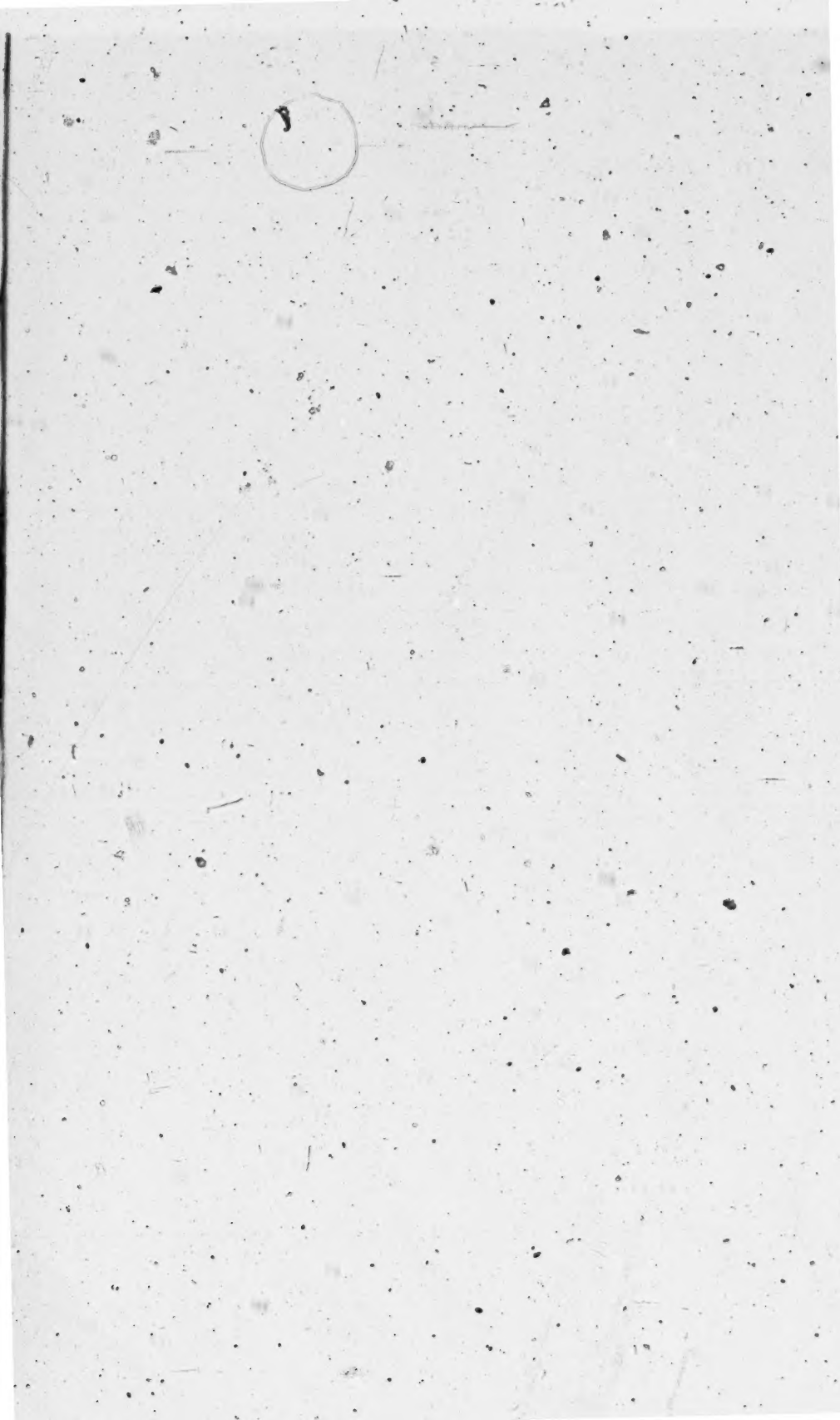
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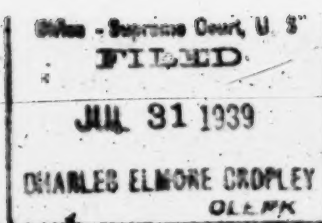
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Dated at Washington, D. C., December 9, 1939.



FILE COPY



# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION  
(a corporation),

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY  
(a corporation),

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### STATEMENT OF FACTS INVOLVED.

Petitioner's statement of the matter involved and the argument advanced in support of the petition for writ of certiorari proceed upon the theory that the payment by petitioner to the respondent, in accordance with the contract whereby respondent leased certain tank cars, would result in a rebate and discrimination prohibited by the provisions of the Elkins Act. The following facts were either stipulated or

proven without conflict and are not the subject of controversy:\*

The El Dorado Company is a manufacturer of coconut oil with a plant located on San Francisco Bay. (R. 30.) The car corporation is a company not engaged in transportation, and is the owner of tank cars leased or rented by it to commodity shippers. (R. 30.) For the movement of its vegetable oil El Dorado Company required steel tank cars fitted with heating coils. (R. 169.) In 1933, and for many years prior thereto and since, the published and filed tariffs of all railroad carriers provided that the railroads would not furnish these tank cars for transportation purposes (R. 163, 167, 201), but would allow and pay for the furnishing thereof a mileage allowance of  $1\frac{1}{2}\text{¢}$  per mile "to the car owner or to the party who has acquired the car or cars". (R. 192-197.)

On September 28, 1933, El Dorado Company entered into an agreement of lease with the car corporation whereby there were leased to the oil works for a period of three years fifty tank cars of a specified capacity, equipped with heating coils and otherwise suitable for the transportation of vegetable oils. (R. 30, 20-28.) The oil works undertook to pay a monthly cash rental for these cars and in return therefor was given the exclusive possession and the right to use said cars. (R. 20 et seq.) In the lease agreement the car corporation undertook to collect from the railroad

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\*For convenience and in conformance with the petition we will refer to the petitioner as the "car corporation" and the El Dorado Oil Works and its wholly owned subsidiary the respondent as the "El Dorado Company". •

carriers the said mileage allowances for the benefit of its lessee the El Dorado Company. (R. 26.) The El Dorado Company fully performed under the said agreement, and the car corporation fully performed under said agreement up to June, 1935, and during that time collected the mileage allowances stipulated in the published tariffs and paid them over to the El Dorado Company monthly. (R. 32.) Thereafter the car corporation refused to make payments in excess of the amount becoming due to it for the car rentals, notwithstanding that it continued to collect the said mileage allowances in full from the railroad carriers. (R. 33-34; Petition, p. 6.)

The El Dorado Company instituted this action to collect the moneys so withheld by the car corporation. (Petition, p. 7.) It was stipulated at the trial that the amount so collected and withheld by the car corporation up to the filing of this action was \$18,532.78. (R. 45, 46.)

In its answer to the complaint the car corporation admitted the lease agreement and its validity, but denied liability upon the sole ground that the payment of said mileage allowances to El Dorado Company was expressly prohibited and enjoined by the provisions of the Elkins Act; and that if the car corporation were to make any such payments in excess of the "car hire or rental" reserved in the lease, said payments would be unlawful in that El Dorado Company would secure transportation of property at rates less than those named in the published and filed tariffs of the common carriers, and that a rebate, concession

or discrimination prohibited by the Elkins Act would result. (R. 17, 18.)

The car corporation did not, in its answer or during the trial, question the legality of the said mileage allowances provided for in the published tariffs. Nor did it question *its* right to receive the same from the carriers. It was not disputed that the various railroad carriers over whose lines the said tank cars moved in the transportation of the El Dorado Company's coconut oil, received the full freight rates named in the tariffs published and filed by such carriers. (R. 169.) It was also admitted that the mileage allowances paid by the said carriers to the car corporation as the owner of the said cars were only and exactly those provided by the said published tariffs to be so paid. (R. 174.)

Petitioner did not plead, nor has it in any manner or at any time claimed, nor does it now claim, that the lease agreement was a cloak to cover any plan or scheme to accomplish a secret rebate or discrimination, or to evade the prohibitions of the Elkins Act. Without the concurrence or knowledge of the carriers the car corporation leased the tank cars to the El Dorado Company for its exclusive use in the transportation of its coconut oil.

Therefore, the only issue tendered by petitioner's answer in the District Court, and the only question for determination, was whether the car corporation should continue its payments to the El Dorado Company in accordance with its agreement of lease, of the mileage so collected, or whether it could retain the

sums so collected to the extent that they exceeded the cash rentals payable by the El Dorado Company as the lessee of the cars—on the ground as pleaded that such payments were prohibited by the Elkins Act.

**ARGUMENT IN SUPPORT OF DECISION OF  
CIRCUIT COURT OF APPEALS.**

In the District Court and again in the Circuit Court of Appeals respondent took the position that the agreement of lease of the tank cars was admittedly valid; that the moneys agreed to be paid by the car corporation to respondent were only those which were properly receivable from the carriers in accordance with their published tariffs and mileage allowances; that as to the cars involved in every instance the full commodity freight rate provided to be paid according to the applicable freight tariffs was paid by the consignee or purchaser of the coconut oil, and that the only mileage allowances made by the carriers were those strictly provided for in the published tariffs and available to all shippers furnishing tank cars to railroads.

No person or corporation in any manner engaged in transportation was directly or indirectly a party to or concerned with the said agreement of lease.

*U. S. v. Peterson* (D. C. Mont. 1924), 1 Fed. (2d) 1018.

On these bases there could be no violation of the provisions of the Elkins Act because there was no carriage of commodities at less than the full published

freight rates applicable thereto; the payment of mileage allowances were not rebate or concession because it was specifically provided for in the mileage tariffs as published and filed.

*U. S. v. Durkee Famous Foods Inc.* (D. C. N. J. 1937), 17 Fed. Sup. 846.

The Interstate Commerce Commission, though authorized to do so had never questioned the propriety of those allowances as applied to tank cars though they had been in effect for many years. Accordingly railroad carriers as well as shippers were bound to conform therewith. In these circumstances the \$18,532.78 which is the subject of the present suit was lawfully paid by the carriers to the car corporation. Since the money was legally received by the car corporation it was obligated, according to the terms of its agreement of lease, to pay the same over to the El Dorado Company as provided in said agreement of lease.

The Circuit Court of Appeals sustained all of the said contentions of the respondent, and in addition held (R. 308 et seq.) that the El Dorado Company and not the corporation was, by reason of the lease above mentioned, the exclusive supplier of the tank cars for transportation purposes; also that if there was merit in the argument of the car corporation that moneys received by the supplier of tank cars in excess of the monthly cash rental paid by the supplier to the car corporation for those cars constituted a "profit", the car corporation had not tendered that issue and had failed entirely to prove that the El

Dorado Company's total cost of supplying the cars to the railroads was less than the mileage earnings allowed under the tariffs.

Inasmuch as the decision of the Circuit Court of Appeals that there was no violation of the prohibitions of the Elkins Act, because the full published tariff rates were paid and the mileage allowances paid to the car corporation were only those definitively provided for in the mileage tariffs, was strictly according to the facts and amply supported by authority, the question as to the cost to the El Dorado Company of supplying the tank cars for transportation purposes, where the railroad carriers did not and could not furnish such cars, is of secondary importance. In the absence of any question by the Interstate Commerce Commission, a shipper or a carrier, as to the reasonableness of such mileage allowances, they must be accepted as reasonable and by virtue of their publication they are lawful and binding. (49 U. S./C. A. Sec. 41 (1) and (2).)

**ANSWER TO ARGUMENTS OF PETITIONER SUPPORTING  
PETITION FOR WRIT OF CERTIORARI**

**I.**

**PETITIONER IS NOT PROHIBITED BY LAW, INCLUDING THE  
ELKINS ACT, FROM PAYING TO RESPONDENT ANY MILE-  
AGE EARNINGS WHICH ARE THE SUBJECT OF THIS SUIT.**

For the purpose of pointing out the distinction between the situation here involved and the situation in the cases claimed by petitioner to govern this case, we wish to emphasize certain facts as shown by the record.

### A. The important facts.

Respondent El Dorado Company was not only a shipper of commodities over the lines of rail carriers from San Francisco Bay to points in the East, but also it was a supplier of a particular type of tank cars to the railroads for the purpose of said shipments. (R. 31-32, 169.) Respondent did not own its own tank cars, but obtained them by lease from petitioner car corporation under a contract set forth in petitioner's answer in the District Court. (R. 30.) This contract set forth certain of the obligations and costs imposed upon El Dorado Company respecting these tank cars. (R. 23 et seq.) Of course, as a supplier of transportation facilities to the railroads, respondent El Dorado Company was entitled to compensation for furnishing these tank cars to the railroad.

*U. S. v. Baltimore & Ohio Railroad* (1913), 231 U. S. 274, 58 L. Ed. 218;

*Interstate Commerce Commission v. Diffebaugh* (1911), 222 U. S. 42, 56 L. Ed. 83;

*Union Pacific v. Updike Grain Company* (1911), 222 U. S. 215, 56 L. Ed. 171;

*American Trucking Assns. Inc. v. U. S. et al.* (D. C. Dist. of Col. 1936), 17 Fed. Sup. 655; 49 U. S. C. A. Sec. 1 (14);

49 U. S. C. A. Sec. 15 (13).

The contract with the car corporation provided for the collection of this compensation by the car corporation, for the crediting of all amounts collected against rentals, and for the monthly remission of the excess, if any, by the car corporation to the El Dorado Com-

pany. (R. 32.) The car corporation did not supply any facilities to the railroad nor did it have any relationship with the railroad. (R. 30, 34.) The railroads serving San Francisco Bay did not offer to, and did not actually furnish shippers of coconut oil the type of tank cars necessary for such shipments. (R. 163-172.) El Dorado Company and also other manufacturers of vegetable oils were forced to obtain tank cars from other sources and to furnish those tank cars to the railroad for shipping their own commodities. (R. 163-176.) The car corporation leased many other tank cars to other shippers of vegetable oils on the Pacific Coast. (R. 175-176.)

Except for the contract between the El Dorado Company and the car corporation there is nothing in the record to show that the railroads would not make payment of the compensation for furnishing tank cars directly to the respondent El Dorado Company. There is nothing to show that the Interstate Commerce Commission ever held the *amount* of compensation to be unreasonable, or ever held that such compensation could not be paid directly to the shipper-supplier, or could not be paid to the shipper-supplier through the car owner who leased the cars to the shipper-supplier. Neither the Interstate Commerce Commission, nor any railroad, nor any shipper or other party was a party to the suit in the District Court between El Dorado Company and the car corporation.

**B. Cases relied on by petitioner as conflicting with decision of Circuit Court of Appeals.**

In its brief petitioner relies heavily upon three cases as being in conflict with the decision of the Circuit Court of Appeals, to-wit, *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, *Interstate Commerce Commission v. Reichman*, 145 Fed. 235 (C. C. N. D., Ill. 1906), and *Spencer Kellogg & Sons v. U. S.*, 20 Fed. (2d) 459 (C. C. A. (2d) 1937), cert. den. 275 U. S. 506. All these three cases are easily distinguishable from the situation here.

The petitioner quotes extensively from the report of the Interstate Commerce Commission in the *Refrigerator Car Case*, "Investigation and Suspension Docket No. 3887, Use of Privately Owned Refrigerator Cars" (201 I. C. C. 323). The report of this decision is set out in full in the record. (R. 49-182.) In its said report the Commission developed the abuses resulting from the extensive use by shippers of privately owned refrigerator cars in competition with similar types of cars owned by the carriers and available for use by shippers. The Commission asserts with perfect propriety that the carriers suffer to the extent that they have paid mileage to shippers who furnished refrigerator cars instead of using the available refrigerator cars of the carriers. The question considered and decided was as to the reasonableness of the allowances so paid on refrigerator cars and the ruling of the Commission against the allowances was expressly limited to refrigerator cars and the findings were so restricted. (R. 159.) The Commission did declare, however, that the carriers do not hold them-

selves out to furnish *tank cars* distinguished from *refrigerator* cars to shippers, nor do they own or lease sufficient cars to do so. (R. 138.) Furthermore the Commission stated that the evidence before it was not comprehensive enough to warrant any conclusion as to the use of private tank cars. (R. 139.) In fact the proceeding involving all cars other than refrigerator cars was ordered dismissed. (R. 159-162.) With reference to the use of private refrigerator cars which directly competed with such cars owned by the carriers, the Commission's argument is not apposite to the use of tank cars where the railroads assume no responsibility to furnish them, do not furnish them, and have not sufficient cars to meet the requirements of shippers.

That the Commission did not feel called upon to question in any manner the allowances payable under the mileage tariffs for the use of tank cars is made clear not only by the fact that the Commission limited its order to refrigerator cars and dismissed the proceeding as to tank cars for want of evidence, but that it has never since questioned the reasonableness of the allowances paid for the furnishing of tank cars according to the published and filed railroad tariffs.

It is true that the Commission further stated, in the refrigerator car case, as quoted by petitioner (Petition p. 5) that certain shippers enjoyed benefits not available to all shippers in the particular circumstances attending the use by certain shippers of refrigerator cars privately owned instead of those belonging to the railroad carriers. However, the record before this

Court in this case is noteworthy in that there is not a scintilla of evidence that other shippers were not in exactly the same position as the El Dorado Company. On the contrary it is uncontradicted that the railroads *could not and did not* furnish the *necessary type of tank cars* to all shippers of vegetable oils, and that *all such shippers* had to obtain their cars from other than railroad sources. (R. 163-170.) Furthermore the car corporation admittedly had numerous tank cars leased out to other shippers of vegetable oils throughout the whole Pacific Coast. (R. 173.) There is nothing to show that the mileage tariffs did not apply to the mileage earned by the tank cars furnished by all such shippers nor that all such shippers did not have contracts with car companies similar to the one sued upon in this case. Every element condemned or criticized in the refrigerator car proceeding is therefore wanting in this case, and moreover as shown by the undisputed evidence, the full tariff freight rates were paid to the railroads by the consignees of all the coconut oil shipped by respondent in its leased tank cars.

In the last paragraph of page 5 of its brief petitioner quotes a statement of the Commission in the refrigerator car proceeding condemning payment to certain shippers for the use of refrigerator cars and other actual expenses in connection therewith. Apart from the many other distinctions between the situation inquired into by the Commission and the situation involved in this suit, the Commission specifically alludes to the fact that the shippers in question were

receiving as compensation substantially more than the rental and other expenses. But in our case petitioner herein has always claimed that the mere excess over rentals, regardless of the possibility of other expenses, constitutes a "profit" which in turn constitutes a rebate. The Commission's report shows that there was no evidence before the Commission pertaining to expenses and costs in connection with private tank cars. The Circuit Court of Appeals concluded therefore, that the situation in this case is entirely different from that which brought forth the Commission's report and order cited by petitioner in its brief.

Petitioner relies upon *Interstate Commerce Commission v. Reichmann* (145 Fed. 235). That case did not involve, nor is it so contended by petitioner, the effect of an agreement on the part of a car owner to pay to a lessee or user, any portion of the mileage allowance earned according to the published tariffs, for the use of railroad cars. Nor does the opinion condemn the payment by the car owner of any portion of the mileage allowance except in the particular circumstances shown to exist in that case. Reichmann was the vice president of a car company owning a large number of cars used by the railroads in the transportation of livestock over their several lines. The Interstate Commerce Commission was authorized by Section 2 of the Elkins Act to investigate all charges of abuses of the Act, and in that behalf to call and examine witnesses. Under this authority, the Commission, having called Reichmann, asked what part of the mileage received by his company from the rail-

roads for the use of its cars by said railroads was paid to individual shippers. Reichmann refused to answer, and the question referred to the Court by the Commission was as to the right of the Commission to insist upon the answer. At the outset of his opinion, the District Court said (p. 237):

"In considering the question, I shall assume, as counsel did at the argument, that an answer by the witness would have disclosed that payments of money were made by the Street Company to shippers of freight, and with a view to thereby inducing such shippers to demand that carriers furnish them with Street's cars for the transportation of their future shipments."

In discussing the authority of the Commission to insist upon the answer to the particular question, the Court reviewed at length the history and purpose of the Interstate Commerce Act, including the Elkins Act. But the comments of the Court could not change the issue before it, or extend the decision beyond the facts of the case. As stated by the Court, the facts were that the car company *rented its cars to the railroads*. The railroads furnished them, as it did other cars owned by them, to shippers. To induce shippers to use its cars as distinguished from the cars owned by the railroads or cars owned by other companies, Reichmann's car company paid to the shippers, who would demand and use its cars, a portion of the mileage or rental received by his company from the railroad carriers. The feature of that case which made the limitations of the Interstate Commerce Act applicable, and the feature that distinguishes that case

from this, was the fact that to induce the shipper to demand from the railroad carrier freight cars owned by his company, Reichmann paid the shipper a portion of the money received from the railroad carriers. As pointed out by the Court the shipper paid the freight but received back a portion of the money so paid in consideration of his use of the particular cars, which the carriers had rented from Reichmann's company. As before stated, petitioner does not in this case claim, nor did the trial Court find, that the *agreement* sued upon was illegal, and the opinion in the Reichmann case has no application here because the facts were entirely different. Furthermore, at the date of that decision, the Hepburn Amendment had not been enacted, and was not incorporated into the Interstate Commerce Act until 1906. Carriers are expressly permitted to allow shippers compensation for furnishing tank cars and other facilities.

The third case relied upon by petitioner is *Spencer Kellogg and Sons v. U. S.*, 20 Fed. (2d) 459. The case involved the construction of the Elkins Act, and as said by the Court:

"The test to be applied in determining whether the Act is violated is whether the terms of the statute include the acts committed. Whether the person committing the act is a shipper or carrier is not determinative." (p. 461.)

Application of the test, as stated, to the facts of the present case, clearly shows that the payment by petitioner of the amounts collected by it as mileage allowances for respondent's account cannot be coordinated

with any prohibition contained in the act. Spencer Kellogg and Sons, in the use of its grain elevator, acted as one of the media engaged in the interstate transportation of grain. This is clear from the following language of the Court which we quote from page 461 of the opinion:

"This plaintiff in error, in using its elevator for transportation, performed transportation services and effected the through movement of interstate shipments of grain. It was engaged in interstate traffic."

The published railroad tariffs provided a through freight rate for the transportation of grain from the point of original shipment to the Atlantic Seaboard. This through rate covered an allowance of 1¢ per bushel to the elevator company for unloading the grain from the lake steamers, moving it through the elevator and loading it upon railroad cars at Buffalo. To induce shippers to route their grain, so that it would pass through the Kellogg elevators, in its interstate transportation the Kellogg corporation allowed a rebate of  $\frac{1}{2}$ ¢ per bushel and arranged the payment thereof through a broker in New York. While therefore the shipper paid the full freight rate he received back from Spencer Kellogg and Sons, one of the transporting carriers, one-half of the sum paid to the elevator company for such transportation services. This was clearly a rebate by an interstate carrier and the Court sustained the conviction on that ground. In that connection, we quote the following from the closing paragraph of the Court's opinion (p. 462):

"The penalty is imposed here, not because it was acting for the carrier, but because it performed a service of transportation, and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

This excerpt from the opinion clearly answers the argument which is advanced in petitioner's brief that the cited case held that the Elkins Act was not limited in its application to shippers and carriers. The Court expressly held that the service rendered by Spencer Kellogg and Sons Company was one step in the actual transportation of the grain and the company was condemned solely on that ground.

**C. The reference by the Circuit Court of Appeals to car mileage tariffs.**

On pages 30-32 of its brief, petitioner criticizes certain references in the opinion of the Circuit Court of Appeals to rail carriers' car mileage tariffs. These criticisms are unjustified. The record shows that during the period covered by this suit there were in existence certain regulations found in the railroad carriers' car mileage tariff wherein it was provided that mileage earnings would be paid to the car owner, or to the person that had acquired the cars and had fulfilled certain other requirements set forth in the regulations. (R. 191-196.) The record does not reveal that there was any other tariff provision or any regulation or order of the I. C. C. prohibiting payment by railroads of mileage compensation directly to the supplier of the facilities. It is, of course, clear from the cases we have cited above and from the provisions

of the Interstate Commerce Act, that a shipper-supplier like El Dorado Company is entitled to compensation for furnishing facilities to the railroad.

*U. S. v. Baltimore & Ohio Railroad* (1913),  
231 U. S. 274, 58 L. Ed. 218;

*Interstate Commerce Commission v. Ditten-  
baugh* (1911), 222 U. S. 42, 56 L. Ed. 83;

*Union Pacific v. Updike Grain Company*  
(1911), 222 U. S. 215, 56 L. Ed. 171; .

*American Trucking Assns. Inc. v. U. S. et al.*  
(D. C. Dist. of Co. 1936), 17 Fed. Sup. 655;

49 U. S. C. A. Sec. 1 (14);

49 U. S. C. A. Sec. 15 (13).

Thus those parts of the opinion of the Circuit Court of Appeals referred to on pages 31-32 of petitioner's brief are entirely justified.

Petitioner here for the first time (Brief p. 31) refers to a tariff regulation effective April 1, 1935, which provides that mileage payments should not be made to the lessee of tank cars. This provision, of course, does not affect any part of the sum sued for by respondent in the Court below. The sum sued for by respondent in the Court below includes mileage earnings which were due and should have been paid by the car corporation to El Dorado Company prior to May 31, 1935. (R. 2, 6.) Prior to July 1934, when the car corporation admittedly breached its contract with the El Dorado Company (Petition p. 6), the customary method of adjustment under the contract between the parties resulted in the payment to El Dorado Company by the car corporation of excess

mileage earnings sometime during the second month after mileage was actually earned by the tank cars. (R. 182.) Thus the tariff regulations referred to on page 31 of the petitioner's brief do not in any manner affect the sum involved in this suit and the parties have never so considered it prior to petitioner's brief.

**D. The agency theory.**

It was clear to the Circuit Court of Appeals that the contract and method of dealing as between the car corporation and the El Dorado Company resulted in making the car corporation an agent for the collection of car mileage revenue earned by the tank cars furnished by El Dorado Company to the railroad. (R. 305, 332.)

As indicated above, the law expressly contemplates that a *shipper-supplier* of tank cars to railroads should be compensated for furnishing them. And there is nothing in the railroad tariffs or rules of the I. C. C. preventing such compensation by the rail carrier to the *shipper-supplier* directly. There is also nothing in the record to show that the agency contract was entered into as a device to effect a rebate or discrimination. Thus there is clear justification for the recognition by the Circuit Court of Appeals of the existence of an agency to collect the lawful compensation for respondent, a supplier of transportation facilities to railroads.

## II.

PETITIONER DID NOT PLEAD NOR PROVE THE ILLEGALITY OF PAYING TO RESPONDENT MILEAGE EARNINGS IN EXCESS OF "RENTAL".

✓ In its opinion below, the Circuit Court of Appeals set forth as one ground for its decision that no question of a rebate or discrimination could arise until the car corporation had established that *the costs and expenses of the El Dorado Company in supplying the cars to the carriers are less than the mileage earnings of the cars.* (R. 308.)

There can be no question of the validity of the point made by the Circuit Court of Appeals. The whole basis of petitioner's defense to the suit of the District Court was that if it were to pay over excess mileage earnings to the El Dorado Company El Dorado Company would realize a "profit" as a supplier of tank cars to the railroad and that such a "profit" to it as a supplier would constitute a rebate to it as a shipper of commodities. Petitioner has always claimed that the receipt by respondent of any mileage compensation in excess of the single item of rental would constitute a "profit". We assume that the petitioner means a net profit. It was concluded both in the answer of the petitioner in the District Court and in the conclusions of law in the District Court that the receipt by El Dorado Company of mileage compensation in excess of this single item of rental would constitute a rebate and discrimination in violation of the Elkins Act. (R. 18, 35.)

✓ Petitioner claims that the record reveals no cost or expense other than car rental incurred by El

Dorado Company in connection with the use and furnishing of the tank cars. Petitioner further claims that neither party raised any issue as to additional costs and that the Circuit Court of Appeals was not justified in holding that petitioner did not prove in the trial Court that the item of rental constituted the sole cost to the El Dorado Company.

The fallacy of petitioner's argument and the correctness of the Court's opinion are immediately apparent. The contract with the car corporation was proved (R. 46), respondent's full performance thereof was admitted (R. 13), and the car corporation admittedly failed to perform under the contract. A *prima facie* case for the recovery of the stipulated sum of \$18,532.78 was made out. The defense of the petitioner herein was that performance by it was illegal and would be in violation of the provisions of the Elkins Act.

It is a well recognized principle of law that the burden of meeting and proving illegality is upon the party asserting it.

22 *Corpus Juris* 147.

To support its conclusion that the El Dorado Company as a shipper would receive a rebate if the car company were to pay over such excess mileage to it, the car company merely plead in its answer (R. 18), that the payment by it of mileage earnings in excess of the "car hire or rental reserved" in the contract would constitute an illegal rebate, and the trial Court so concluded. (R. 35.) The record also shows that

petitioner made no allegation in its answer, made no proof at the trial, and that the trial Court made no finding of fact either that rental constituted the sole item of cost and expense to respondent as a supplier of tank cars, or that respondent had no additional cost or expenses, or that any part or all of the mileage earnings sued for by respondent as supplier would constitute a "profit" to it, or that a "profit" to it as supplier would constitute a rebate to it as a shipper of commodities.

Petitioner seeks to remedy its failure to prove illegality at the trial by now asserting that *respondent* should have raised the torch and *proven the legality* of performance by petitioner under the contract. There is nothing in the record to indicate that petitioner could not have made proof of illegality.

The record shows that petitioner is the owner of a large number of cars and was engaged in the business of leasing them throughout the country. (R. 173-176.) There was evidence that about 400 cars at one time were under lease in California (R. 175) and that several other shippers of vegetable oils obtained cars by lease from petitioner. (R. 175, 176.) Petitioner's answer in the trial Court sets forth the contract with respondent wherein obligations of the respondent in respect to the leased cars were specifically referred to. (R. 23-26.) The record clearly shows that petitioner could readily and adequately have given evidence to negative the existence of other costs or obligations if there were actually no other costs except the obligation to pay rent.

Petitioner also urges that there is nothing in the record to show that any additional cost or obligation existed. This is clearly error. The *contract itself* which was attached to petitioner's answer expressly imposed upon respondent El Dorado Company the obligation to return the leased cars "in the same condition in which they were furnished excepting for ordinary wear and tear" (R. 24); petitioner relieved itself from any liability for damage or loss of the whole or any part of the shipment of any of the leased cars or for any loss from injuries to persons or property; respondent agreed to protect and save petitioner harmless from any such loss or damage; liability for damage to the cars while on privately owned tracks was imposed upon respondent; and respondent was required to replace removable tank parts. (R. 25.) The contract also shows that rental payments were required to be paid on the first of each month in advance (R. 23) and thus respondent as supplier had that part of its investment tied up until it could supply the tank cars to the railroads and thereby earn mileage. In addition to these clearly indicated costs and obligations of respondent in connection with the use of the leased tank cars, the Circuit Court of Appeals did not close its eyes to other costs and obligations which are matters of common knowledge (R. 308-311), but which petitioner objected to in its brief. (p. 36.)

The record and the opinion of the Circuit Court of Appeals clearly show that costs and obligations in

addition to rental actually did exist, and as petitioner did not prove that the whole amount would constitute a "profit" to respondent, its defense falls.

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### III.

#### PERFORMANCE OF THE CONTRACT BEING ENFORCEABLE, ENFORCEMENT OF THE ELKINS ACT IS NOT INVOLVED.

Petitioner's final argument is that the enforcement of a contract found to be in conflict with the Elkins Act must yield to the enforcement of the Elkins Act. We believe we have in effect already answered this argument of petitioner. We have shown that the decision of the Circuit Court of Appeals that performance under the contract would not result in violation of the Elkins Act is correct and is supported by the authorities, and by the undisputed evidence adduced at the trial. Therefore, there is nothing to sustain a refusal by petitioner to perform under the contract, and respondent is entitled to judgment for the full amount admittedly withheld from it by petitioner.

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#### CONCLUSION.

From the record of this litigation and from the decision of the Circuit Court of Appeals it is clear that petitioner, without questioning the lawfulness of payment of mileage earnings to it, is merely seeking to escape its obligations to respondent to pay over

mileage earnings, which was one of the considerations of the lease contract. Petitioner's excuse for breaking its contract was claimed to be the advice of counsel as to the applicability of a report of the Interstate Commerce Commission, which concerned an entirely different matter. The decision of the Circuit Court of Appeals against petitioner is directly in line with decisions of this Court, and is not in conflict with any cited authorities.

We submit that petitioner has not shown or even indicated any substantial reason for this Honorable Court to exercise its discretion and grant to petitioner a writ of certiorari, and therefore the petition should be denied.

Dated, San Francisco, California,  
July 26, 1939.

Respectfully submitted,

W. F. WILLIAMSON,

*Attorney for Respondent.*

WILLIAMSON & WALLACE,  
*Of Counsel.*

(Appendix Follows.)



## **Appendix.**



## Appendix

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(T. 49 U. S. C. A.):

Section 41. Liability of corporation carriers and agents; offenses and penalties.—(1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than \$1,000 nor more than \$20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign com-

merce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$1,000 nor more than \$20,000: Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the Court. Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) Liabilities for acts of agents; departure from published rates. In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate, as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Receiving rebates; additional penalty and recovery thereof. Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable considera-

tion as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial Court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any Court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration, so received or accepted, or both, as the case may be (Feb. 19, 1903, c. 708, Sec. 1, 32 Stat. 847; June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587.)

(T. 49 U. S. C. A.):

Section 42. Parties included in proceedings to enforce law. In any proceeding for the enforcement of the provisions of the statutes relating to interstate

commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any District Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, Sec. 2, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

(T. 49 U. S. C. A.):

Section 43. Proceedings in equity to enforce tariffs, etc.; district attorneys; damages; witnesses; precedence. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the District Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the Court summarily to inquire

into the circumstances, upon such notice and in such manner as the Court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto, as the Court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said Court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by the preceding chapter. And in proceedings under said sections and the preceding chapter the said Courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the

criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of sections 41 and 45 shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission. (Feb. 19, 1903, c. 708, Sec. 3, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

(14) Establishment by commission of rules, etc., as to car service. The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices. (Feb. 4, 1887, c. 104, Sec. 1, 24 Stat. 379; June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584; Apr. 13, 1908; c. 143, 35 Stat. 60; June 18, 1910, c. 309, Sec. 7, 36 Stat. 544; May 29, 1917, c. 23, 40 Stat. 101; and Feb. 28, 1920, c. 91, Secs. 400-403, 41 Stats. 474-478.)

(T. 49 U. S. C. A., Section 15):

(13) Allowance for service or facilities furnished by shipper. If the owner of property transported

under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (Feb. 4, 1887, c. 104, Sec. 15, 24 Stat. 384; June 20, 1906, c. 3591, Sec. 4, 34 Stat. 589; June 18, 1910, c. 309, Sec. 12, 36 Stat. 553; and Feb. 28, 1920, c. 91, Sec. 421, 41 Stat. 488.)





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**In the Supreme Court**

OF THE  
**United States**

OCTOBER TERM, 1939

**No. 129**

**GENERAL AMERICAN TANK CAR CORPORATION**  
(a corporation),

vs.

*Petitioner,*

**EL DORADO TERMINAL COMPANY**  
(a corporation),

*Respondent.*

**BRIEF FOR RESPONDENT.**

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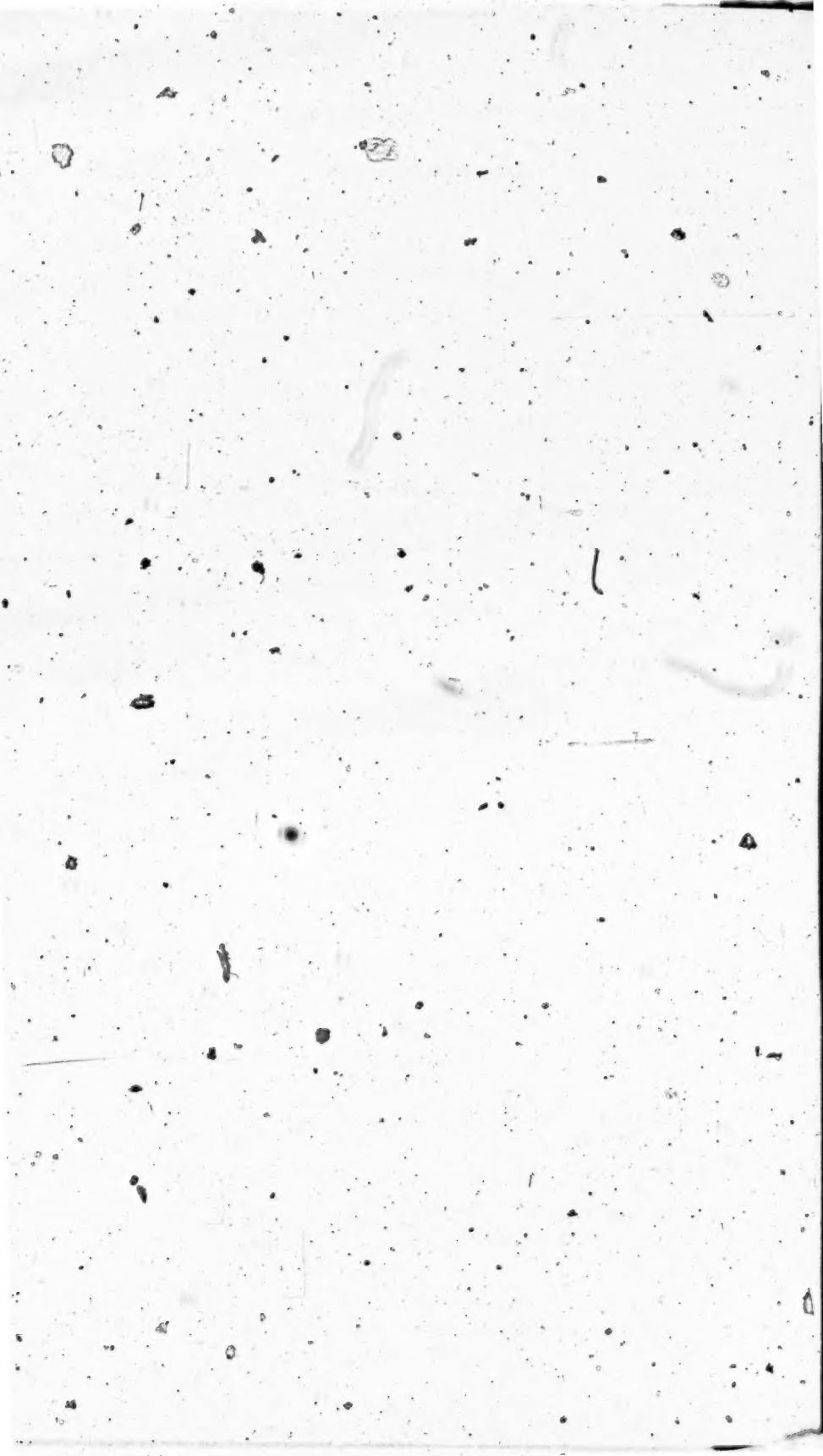
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# In the Supreme Court

OF THE  
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OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION  
(a corporation),

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY  
(a corporation),

*Respondent.*

## BRIEF FOR RESPONDENT.

### RESPONDENT'S STATEMENT OF THE CASE.

Although petitioner in its "Statement of the Case" announced that a single issue of federal law arising under the Elkins Act is involved in this cause, that question and petitioner's contractual obligation to respondent are lost sight of in the general discussion in petitioner's brief of many other more or less academic matters. We think it proper, therefore, to restate the facts of the case which are not controverted, but which in the main were covered by stipulation.



In conformance with the brief for the petitioner we shall refer to the El Dorado Oil Works and respondent El Dorado Terminal Company, its wholly owned subsidiary, as the "El Dorado Company" and the petitioner will be referred to as the "Car Corporation".

On September 28, 1933, the El Dorado Company, a California corporation, was engaged in the manufacture of coconut oil at its plant located in the City of Berkeley on San Francisco Bay. The car corporation was engaged in the business of manufacturing, selling and renting tank cars and other types of cars. The coconut oil of the El Dorado Company was shipped in tank cars. The railroads operating out of the San Francisco Bay area did not have tank cars sufficient in number or adequately equipped with the necessary heating coils to meet the requirements of the El Dorado Company and other manufacturers of vegetable oils; nor did they undertake to furnish such cars. In fact their published tariffs provided that carriers did not obligate themselves to furnish tank cars. (R. 163, 201.) Therefore, and to assure to itself a supply of tank cars of proper size and equipped with necessary heating coils for the purpose of its business, the El Dorado Company entered into a written agreement with the car corporation dated September 28, 1933. (R. 20-28.) Under the terms of this contract the car corporation leased to the El Dorado Company fifty tank cars of the agreed capacity and equipment at a monthly rental, and also agreed to furnish to the oil company such additional tank cars as required by the oil company in its business, at an agreed monthly

rental. The El Dorado Company agreed to pay such rentals monthly in advance. In consideration of these payments the car corporation agreed that the El Dorado Company should have the possession and exclusive use of the tank cars for the agreed period of three years and also agreed to collect from the railroad carriers over whose lines the cars moved the compensation or allowance provided to be paid in the published rules and tariffs of the carriers as compensation for the furnishing of such cars. For many years prior to the date of the agreement and thereafter continuously for the period for which recovery is sought in this action, the published railroad tariffs applicable to all interstate carriers provided a fixed rate for the movement of such tank cars from the oil company's plant on San Francisco Bay to various points in the middle west and eastern states to which the oil company's products were shipped; and those tariffs also provided for the payment of mileage at the rate of  $11\frac{1}{2}\text{¢}$  per mile for the use of tank cars of private ownership, such payments to be made "to the car owner or to the party who has acquired the car or cars according to the assigned reporting marks published in the official railway equipment register". The oil company fully performed its obligations under the said contract of lease and the car corporation so performed until June, 1934. From the effective date of the contract, January 1, 1934, until June of that year, the car corporation regularly collected the mileage allowances from the railroad carriers for the credit of the El Dorado Company and paid over the sum so collected to the oil company. On July 2, 1934, the

Interstate Commerce Commission released its order entitled "Investigation and Suspension Docket No. 3887, Use of Privately Owned Refrigerator Cars". Thereafter the car corporation refused to make further payments to the El Dorado Company of the amount so collected in excess of the amount becoming due monthly for the agreed car rentals, notwithstanding that it continued to collect the mileage allowances in full from the carriers.

The present action was instituted to collect the moneys so withheld for the period from April, 1934, to and including April, 1935. It was stipulated that the amount so collected and withheld by the car corporation for said period was \$18,532.78. In its answer to the complaint of the oil company the car corporation admitted the making of the contract and attached a copy thereof to its answer and marked the same Exhibit "A". It also admitted the collection and retention of the said mileage allowances but denied liability therefor *solely upon the ground that the payment of the mileage in excess of the car hire or rental reserved in the agreement was expressly prohibited and enjoined by the provisions of the Elkins Act*, and that if the car corporation were to make such payments in excess of the car hire or rental reserved in the said agreement the said payments would be unlawful in that the El Dorado Company would secure transportation of property at rates less than the rates named in the published and filed tariffs of the common carriers, and that thereby the oil company would obtain a rebate or concession and advan-

tage or discrimination in violation of the provisions of the said Elkins Act. The car corporation did not in its answer question the validity of the agreement. Nor was it claimed or even intimated that the agreement was a device or cloak for any secret agreement or that it was anything but what it purported to be—a legitimate contract made in the ordinary course of business. On the foregoing statement the only issue in the case, and the only question before the Circuit Court of Appeals and the District Court was as to whether the provisions of the Elkins Act prohibit the payment by the car corporation to the El Dorado Company in accordance with their agreement of the mileage allowances received by the car corporation from the railroad carriers under the terms of the published and approved tariffs.

The District Court sustained this defense without filing an opinion. The Circuit Court of Appeals held that the El Dorado Company was entitled under the terms of the car lease agreement to \$18,532.78, which the car corporation had collected from the rail carriers and improperly retained to itself in violation of its agreement. It also held that the provisions of the Elkins Act relied upon by the car corporation did not prohibit or prevent the car corporation from paying to the El Dorado Company, as provided in the agreement, the moneys so received and retained.

While petitioner asks this Court to reverse the judgment of the Circuit Court of Appeals, it does not challenge the correctness of the conclusions of the Circuit Court except as to the intent, as distinguished

from the language, of the Elkins Act. In the main the petitioner's brief is devoted to a criticism of various statements of the judges of the Circuit Court, mostly on immaterial matters, made in the course of their opinions. The Circuit Court of Appeals might properly have reversed the judgment of the District Court on the fact, disclosed by the language of the Act itself, and which is undeniable, that the Elkins Act pleaded as petitioner's only defense does not in terms prohibit payment to the El Dorado Company by the car corporation of the car mileage received by it for the use of tank cars held under lease by the El Dorado Company. But Circuit Judges Denman and Mathews both filed opinions holding that the requirements of the Interstate Commerce Act had been fully complied with, that the moneys received by the car corporation were legally so paid in accordance with the applicable filed and published tariffs and that the car corporation was not prohibited by the Elkins Act from paying said sums to the El Dorado Company as provided in the agreement of the parties. (R. pp. 305, 329, 339.) Judge Denman, *ex industria*, traced the history of the Interstate Commerce Act and amendatory legislation, including the Elkins Act. He held that the tariff rates and allowances of interstate carriers as shown by the filed and published tariffs are binding upon all parties concerned in the transportation and may not be departed from by carriers; also that the Courts could not order reduction or change in those tariffs because the fixing of rates was a function of the Interstate Commerce Commission

alone. We mention this matter at this time because the briefs supporting the petition for the writ of certiorari urged without any warrant whatever that the Circuit Court had assumed to fix rates in disregard of the fact that the Interstate Commerce Commission is charged with that duty. We believe that the judgment of the Circuit Court of Appeals was wholly correct on the law and the stipulated facts.

While petitioner's excuse, as pleaded, for refusing to pay to El Dorado Company the sums payable under the contract of the parties, was that such payment was expressly prohibited by the language of the Elkins Act, this is not the claim advanced in petitioner's brief. Petitioner therein contends that because of extraneous matters, the Elkins Act means more than it says, and must be interpreted to mean that the mileage allowance provided in the published tariffs to be paid to the furnisher of tank cars must be reduced by the carriers to the actual cost of the cars. If this were so it would not change the fact that petitioner, as a condition of its lease of the cars, agreed to pay to respondent the amount received for car mileage and has refused to do so although admitting its receipt of the money. If the carriers lawfully paid the mileage allowances to petitioner, and that is expressly claimed at page 53 of the brief for petitioner, the Circuit Court was clearly correct in its judgment that petitioner should pay the money to respondent as provided in the agreement.

# MICRO CARD

TRADE

MARK



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### **SUMMARY OF ARGUMENT.**

1. The provisions of the Elkins Act do not prohibit or enjoin payment by the car corporation of any moneys received from the interstate carriers for the furnishing of the tank cars leased to the El Dorado Company.

2. Payment of the mileage allowances by the car corporation could not be a rebate, concession or discrimination within the prohibition of the Elkins Act because in every instance the railroad carriers received the full rate named in the tariffs published and filed by such carriers, and the carriers paid to the car corporation only mileage allowances provided to be paid in and by said tariff.

3. The mileage allowances so fixed by the tariffs and paid by the carriers were legal and must be accepted as just and reasonable under the law until the Interstate Commerce Commission has held otherwise, or ordered modification thereof.

4. The Interstate Commerce Commission has not so held—on the contrary it has directly approved the payment of such mileage allowances to shippers as well as to car owners.

5. The tariff provisions for mileage allowances are binding upon all carriers in favor of all car furnishers including shippers and do not permit of payments either greater or less than as provided in the tariffs.

## ARGUMENT.

### 1.

**THE ELKINS ACT DOES NOT PROHIBIT THE PAYMENT BY THE CAR CORPORATION OF MONEYS RECEIVED FROM INTERSTATE CARRIERS FOR THE FURNISHING OF TANK CARS LEASED TO THE RESPONDENT.**

The section of the Elkins Act referred to in petitioner's answer, and upon which its defense was based, has been codified in 49 U. S. C. A., and reads as follows:

(T. 49 U. S. C. A.):

**Section 41. Liability of corporation carriers and agents; offenses and penalties.**—(1) *Liability of corporation common carriers; offenses; penalties; jurisdiction.* Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less

than \$1,000 nor more than \$20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier,\* as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$1,000 nor more than \$20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the Court. Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and

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\*We have italicized the portion of the section relied upon by petitioner.

whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"(2) *Liabilities for acts of agents; departure from published rates.* In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42 or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) *Receiving rebates; additional penalty and recovery thereof.* Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by em-

ployee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial Court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any Court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c. 708, Sec. 1, 32 Stat. 847; June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587.)

Under the language of this section the failure of a carrier to file and publish tariffs or rates and charges

as required by other provisions of the Interstate Commerce Act is made a misdemeanor for which the corporation is liable to fine. It is next provided that it shall be unlawful for any person or corporation to offer, grant, accept or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce by a common carrier, whereby such property shall be transported at a rate less than that named in the tariffs published and filed by the carriers or whereby any other advantages are given or discrimination practiced. It is apparent that the purpose of this section was to prohibit rebates, concessions or discriminations in the transportation of property by common carriers which would result in the interstate carrier receiving less than the tariff rate published and filed by the carrier for such transportation. Of necessity such a rebate or concession could only be made if the carrier directly or indirectly participated in the arrangement or understanding. Agreements or relations having nothing to do with transportation do not come within the language or the purpose of the section. The section permits the payment by carriers of compensation in the nature of mileage allowances to the furnishers of cars for railroad use when the tariffs so provide, and contains no prohibition against the payment of such mileage allowances, by a car owner who has collected them, to a car lessee or a shipper under the circumstances of the instant case. The contract involved in the present action was wholly between the car corporation as a manufacturer and owner of tank cars and the oil com-



pany as the manufacturer of vegetable oils whose business required the use of such tank cars. The car corporation had nothing to do with transportation or the use or the routing of the tank cars. Its only relation with the carriers was the collection of the mileage allowance to which it was entitled according to the published tariffs. It was stipulated or shown without conflict that there was no agreement or relation whatsoever between the shipper or the consignees of the cars and the railroad carriers, and there was no evidence nor is it claimed that any carrier was even cognizant of the agreement of September 28, 1933, between the car corporation and the oil company.

It was stipulated at the trial that the carriers over whose lines the leased tank cars moved had filed and published their tariffs as required by the Interstate Commerce Act; also that the full tariff rates therein provided to be paid were so paid on every movement of the tank cars. It was also stipulated that throughout the period covered by the oil company's claim against the car corporation the published tariffs of the carriers contained a rule or provision for the payment of mileage by the carriers for the use of tank cars of private ownership at the rate of  $1\frac{1}{2}\text{¢}$  per mile (R. 192 et seq.) and that the mileage allowance paid by the carriers to the car corporation and sued for in the present action was exactly that which was provided to be so paid in the tariff provisions. Since, therefore, the carriers had filed and published their tariffs, charges and rates and received the full freight rates to which they were entitled under the

tariff for the transportation of the oil company's tank cars and had paid to the car corporation only the mileage allowances provided to be so paid under the tariffs, and exactly as so provided, there was clearly no transportation in interstate commerce "at a rate less than that provided in the published tariffs", and as before stated the prohibition of this section of the Act was limited to rebates, concessions or discriminations which in effect reduced the rate received by the carrier below that which was named in the tariffs published and filed by such carrier.

It has not been claimed by the car corporation that the agreement sued upon was a device or a cloak to cover any agreement, secret or otherwise, for the payment of any rebate or the granting of any concession or discrimination within the prohibitions of the Act. In the later pages of this brief we shall show that such was not the effect of the agreement.

In the light of the stipulated facts above mentioned the statute itself disposed of the special defense set up by the car corporation and in effect the Circuit Court of Appeals so held.

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## 2.

**PAYMENT OF THE MILEAGE ALLOWANCES BY THE CAR CORPORATION TO THE EL DORADO COMPANY COULD NOT BE A REBATE, A CONCESSION OR A DISCRIMINATION WITHIN THE PROHIBITION OF THE ELKINS ACT.**

As stated in the preceding section of this brief, the Elkins Act does not in terms prohibit or even refer

to the payment by a corporation, owning tank cars which it had leased, of any part of the allowance received by it according to the published tariff for the furnishing of such cars. Moreover the prohibition of the Act was directed only to concessions incident to transportation in interstate commerce whereby a carrier received less than the rate to which it was entitled under the published tariffs; and the car corporation was not a carrier or concerned with transportation under the rule declared by this Court in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434. Finally there was no rebate, concession or discrimination because the full rate provided in the published tariffs was paid, and the mileage allowance paid to the car corporation by the carriers was only and exactly what was so provided to be paid in the published tariffs.

What the car corporation, *having nothing to do with transportation*, might do with money paid to it for the furnishing of the cars was in no manner covered by the Elkins Act or other provisions of the Interstate Commerce Act. Payment thereof to another would merely reduce its earnings on the money invested in the cars. Such payment would not result in a reduction of the freight payable to the carriers under the published tariffs or affect any person or corporation engaged in transportation.

It is argued (Petitioner's Brief page 19) that although the car corporation is not a common carrier or subject to regulation as such, it should not be required to carry out the terms of its lease to El Dorado

Company of tank cars because, as observed, "transportation" as defined in the Act, includes "cars", etc. The argument in petitioner's behalf is a superficial reliance upon words without any regard to the substance of the Act, which dealt only with articles in use in interstate movement of freight. "Cars" in the abstract and not in use by carriers in transportation, are clearly not covered by the cited definition.

### 3.

**THE MILEAGE ALLOWANCE AS FIXED BY THE PUBLISHED TARIFFS AND PAID BY THE CARRIERS WAS LAWFUL AND MUST BE ACCEPTED BY THE COURTS AS JUST AND REASONABLE UNTIL THE INTERSTATE COMMERCE COMMISSION HAS HELD OTHERWISE, OR ORDERED MODIFICATION THEREOF.**

The carriers over whose lines the leased tank cars moved were and are subject to the Interstate Commerce Act. Under paragraph (11), Section 1 of said Act (49 U. S. C. A.), every carrier subject to the Act is required

"\* \* \* to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful".

Paragraph (13) of Section 1 authorizes the Commission

"\* \* \* by general or special orders to require all carriers by railroad subject to this chapter, \* \* \*

to file with it from time to time their rules and regulations with respect to car service, and the commission may in its discretion direct that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation and be subject to any or all of the provisions of this chapter relating thereto."

Under the provisions of paragraph (14) of the same Section 1, the Commission may

"\* \* \* after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this chapter including compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it; and the penalties or other sanctions for non-observance of such rules, regulations or practices".

Paragraph (17) of the same section provides that directions of the Commission as to car service and such matters may be made by and through such agencies as the Commission may appoint for the purpose, and directs that it shall be the duty of all interstate carriers to obey strictly and conform to such orders or directions as may be given by the Commission.

Under Section 15 of Chapter 1 of the Interstate Commerce Act the Commission is empowered to determine and prescribe rates, classifications, etc., for interstate transportation and paragraph (13) of Section 15 provides for the allowance for services or

facilities furnished by the shipper in the following language:

*"(13) Allowance for service or facilities furnished by shipper. If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."*

Under the provisions of Section 15, paragraph (1), 9 U. S. C. A. (Chapter 1, page 402), the Commission was empowered to determine and prescribe rates, classifications etc., and after a hearing, either upon complaint made as provided in Section 13 or on its own initiative, to order discontinuance or modification of any rate, fare or charge whatsoever put into effect by carriers and included in the published tariffs.

The "charges and allowances" for providing carriers with cars and other instrumentalities are required by Section 1, paragraph (6), of the Interstate Commerce Act as amended in 1906, to be fixed and

stated in the filed and published tariffs of the carriers.

(49 U. S. C. A., Chap. 1, Sec. 6, par. (1).)

The purpose of the fixing, filing and publication of such charges is to give public notice thereof so as to insure uniformity and make them available to all shippers. Any shipper, consignee or carrier is privileged to complain of any tariff, allowance or rule so filed and published in the tariffs and the Interstate Commerce Commission under the above cited provisions of the Interstate Commerce Act was privileged on its own initiative to investigate and terminate, suspend or modify any tariff rate, rule or regulation included in the published tariffs. The evidence does not show that the mileage allowance paid to the car corporations by the carriers for the furnishing of the tank cars with which this action is concerned was ever made the subject of complaint by anyone whatsoever or drawn in question up to the date of trial of the present action; and since the Interstate Commerce Commission is charged with the duty of determining the reasonableness and propriety of such allowances a litigant must produce an order from the Commission condemning the practice before he can be heard to complain in the Courts. (*Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 247, 257.) The Interstate Commerce Commission though fully authorized to investigate, suspend or modify such car mileage allowances either on complaint or on its own initiative has never made any order in that behalf. In its answer in the District Court, and in its brief

in this Court, petitioner has cited an order of the Interstate Commerce Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars", decided July 2, 1934. (201 I. C. C. p. 323.) Petitioner does not cite this order or the Commission's statement of facts upon which the order was based, as an authoritative ruling by the Commission, but has quoted from it excerpts indicating, as petitioner contends, that the views of the Commission are opposed to the payment of the car mileage allowances by carriers in excess of the cost of the cars to the suppliers. The sections of the Interstate Commerce Act hereinbefore quoted show that the Commission may act after investigation, but that its action must be evidenced by orders, rules or regulations to which all carriers must conform. Its action is reflected in such orders, but may not be determined by inferences or informal statements.

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4.

**COMMISSION'S ORDER IN RESPECT TO USE OF PRIVATELY OWNED REFRIGERATOR CARS NOT APPLICABLE TO THIS CASE.**

Counsel for the petitioner in their brief in this Court apparently concede that the findings of the Commission in the above mentioned proceeding were confined to practices in connection with the use of privately owned refrigerator cars, and that the investigation itself was thus limited. But the Commission definitely limited its action to privately owned refrig-

erator cars as distinguished from other types of cars. The purpose and scope of the investigation are set out in the opening pages of the report. (R. 52.) Primarily the investigation was limited, as the title of the report shows, to the use of refrigerator cars. As stated in the report the Commission of its own motion instituted an inquiry designated as Ex parte 104, "Practices of Carriers Affecting Operating Revenues and Expenses". In referring to the subject of tank cars the Commission said (R. 138):

"The carriers do not hold themselves out to furnish tank cars to shippers and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material although in isolated instances a few may be furnished to shippers".

Continuing on this subject the Commission said of the evidence before it,

"That is not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars attend the use of private tank cars". (R. 139.)

In its summary and conclusions the Commission quotes Section 15 (13) of the Interstate Commerce Act with the statement that said paragraph contemplates that a carrier may use instrumentalities furnished by the owner of property transported and may pay therefor, and that "the only restriction on the payment to the shipper is that it shall be no more

than is "just and reasonable". After reviewing the abuses attendant upon the use of privately owned refrigerator cars, to the exclusion of those owned by the carriers; and the payment by the carriers of mileage on such "private cars" by the carriers, the Commission states (R. 159): "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted, but the general principles enunciated apply equally to all other types of private cars".

Thereupon an order was entered dismissing the ex parte proceeding and ordering the carriers to cancel the schedules covering mileage allowances applicable to the use of refrigerator cars. That the Commission designed that its order should be applicable only to refrigerator cars is shown both by the express limitations above quoted and by the dismissal of Ex parte No. 104 covering the investigation of private cars other than refrigerator cars. In the face of the statement of the Commission that the evidence was "not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars, attend the use of private tank cars" (R. 139), the Commission could not, as it clearly did not, pass judgment upon the question of mileage paid for the use of privately owned tank cars.

A further answer to the contention set out at page 33 of petitioner's brief, that the principles enunciated by the Commission in the refrigerator car case, are

applicable to all types of private cars, is contained in the Commission's findings. After showing that the interstate carriers were in a position to furnish adequate refrigerator cars from those owned or controlled by the carriers, the Commission states:

"The carriers do not hold themselves out to furnish tank cars to shippers, and do not own or lease sufficient tank cars to enable them to do so. Such tank cars as they control are provided only for the movement of company material, although in isolated instances a few may be furnished to shippers." (R. 138.)

This statement is strictly in accordance with the testimony in this case. (R. 163, 167.) To the extent that the carriers had refrigerator cars available for the service of shippers, such cars of the carriers would be supplanted by privately owned refrigerator cars furnished by the shippers, and the mileage paid thereon for such car service would be unnecessary. On the showing before the Commission in the refrigerator car case that such mileage payments resulted in a profit to the shippers, those shippers would have an advantage over shippers using cars belonging to the carriers, and at the same time the carriers would have reduced their earnings by the amounts so paid, unnecessarily, for the use of refrigerator cars, which the carriers themselves could have furnished. The admitted fact that the carriers did not hold themselves out to furnish and in fact did not have tank cars for the transportation of vegetable oils furnishes a very good reason for the holding of the Circuit Court of

Appeals that the decision in the refrigerator car case is not applicable to the use of tank cars. Furthermore, in that proceeding the Commission stated that the evidence as to the practice in relation to tank cars "was not comprehensive enough to warrant any action on the part of the Commission". The order in the case was limited, as before stated, to privately owned refrigerator cars. In these facts there is, we believe a sufficient answer to the contention reserved in petitioner's brief that the conclusions of the Circuit Court "are wholly irreconcilable with the conclusions of the Commission, and that in effect the court has overruled the Commission".

At pages 30 and following of their brief, counsel for petitioner have set forth excerpts from the findings of the Commission in the refrigerator car matter as indicating that the payment by carriers of mileage allowances for the use of refrigerator cars in excess of the cost of the service constituted a benefit or concession to the shippers using such cars. As shown by their context, these statements refer only to refrigerator cars with which alone the proceeding was concerned. If, as counsel urge, though contrary to the statements of the Commission, these findings of the Commission were intended to apply to the use of tank cars, it does not argue in favor of petitioner's contention that the Commission intended to prohibit the payment of such mileage allowances for the furnishing of tank cars. To the contrary, it would clearly indicate that with all the facts and the existence of the claimed abuses before it, the Commission deliberately

excluded the schedules providing mileage allowances for the furnishing of tank cars from its order of cancellation. (R. 162.)

Extrinsic evidence of the intention of the Commission not to disturb the practice, which had continued over a period of many years, on the part of the carriers to pay a mileage allowance of  $1\frac{1}{2}\text{¢}$  per mile for the furnishing of tank cars, is supplied by the action of the Commission in several proceedings where the matter of such mileage allowance for tank cars was directly involved and decided. The practice of furnishing private tank cars by shippers, after the Interstate Commerce Act was amended in 1906, was recognized by the Commission in 1910 in *Proctor & Gamble Co. v. Cincinnati H. & D. Ry. Co. et al.*, 19 I. C. C. R. 556. In 1917 Congress enacted provisions to control the practice and, among other things authorized the Commission to make an investigation concerning the operation of private cars over the lines of interstate railroad carriers. Following a very full investigation, the Commission rendered a decision in the nature of a report on July 31, 1918, which was entitled "*In the Matter of Private Cars*", 50 I. C. C. 652. The hearing involved every phase of the supplying of cars to carriers by shippers. The Commission decided that such supply by the shippers was advantageous to the movement of interstate commerce and that the method of compensating the shipper-suppliers was by a uniform rate per mile as published in the tariffs. In its conclusions the Commission ordered that shippers should be permitted to continue to obtain their cars to transport their shipments by lease from suppliers other

than carriers; that the payments should be made by carriers on the basis of the loaded and empty mileage; that such mileage should be computed on the basis of distance tables and that the then current rate of  $\frac{3}{4}\text{¢}$  per mile for the use of tank cars should be increased to  $1\text{¢}$  per mile. (50 I. C. C. R. 709.) At a later date, and in another proceeding, the mileage rate was ordered increased by the Commission to  $1\frac{1}{2}\text{¢}$  per mile, which rate was effective throughout the period involved in the present action. "*In the Matter of Private Cars*" the Commission expressly referred to the practice stated to be then some twenty years old, under which shippers having leased tank cars from car owners, employed them in the transportation of their own products, and received from the carriers said mileage allowances. The advantages accruing to the shippers as well as the carriers from this practice were fully explained in the Commission's report. But notwithstanding any advantages thus secured by the shipper-supplier, the Commission made the orders above mentioned authorizing the continuance of the payments, and went so far as to increase the car mileage allowance to be paid by the carriers. This, like the subsequent order increasing the mileage allowance to  $1\frac{1}{2}\text{¢}$  per mile, was a definite order of the Commission made under the authority conferred upon it by the Interstate Commerce Act. In so far as it applied to tank cars it was not in any way affected by the later order of the Commission in *Use of Privately Owned Refrigerator Cars*. Nor has it been set aside or modified by any other order of the Commission. It is therefore effective as to all carriers and all shippers.

Obviously what is authorized by the published tariffs cannot come within the prohibitions of the Elkins Act.

The indictment against a refrigerator car company cited at page 18 of petitioner's brief was based on the charge that the agreement there under review was only a device or cloak to cover a rebate. This case presents no such situation. Petitioner pleaded the car lease agreement in its answer as a fair and legal agreement made in the ordinary course of business.

Without claiming that the mileage allowance provision of the tariffs was set aside or suspended by the Commission, petitioner contends, and that is its only contention, that it should be relieved of its obligations under the car lease agreement from paying to the El Dorado Company the mileage so received. No carrier and no other shipper has ever complained of the mileage allowance, nor has the Interstate Commerce Commission ever suspended, or questioned the propriety of, such mileage allowance on tank cars.

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## 5.

**ALL CARRIERS ARE BOUND TO CONFORM TO THE MILEAGE ALLOWANCES STATED IN THE PUBLISHED TARIFFS AND ARE NOT PERMITTED TO PAY FOR THE FURNISHING OF SUCH CARS EITHER MORE OR LESS THAN THE ALLOWANCES PROVIDED IN SAID TARIFFS.**

It is fundamental that uniformity of transportation charges was the main objective of the Interstate Commerce Act, and of all amendatory and supplemental acts. Discrimination by the carriers in any form as between shippers is prohibited. This is conceded in

effect in petitioner's brief. Departure from the published tariff rates would work for discrimination and the payment of either a greater or a smaller amount for car service than as provided in the published schedule of car mileage allowances necessarily would have the same effect. Congress therefore provided in the Elkins Act in 1903 for uniformity by making it a crime for a carrier to deviate from its published schedules. And the Hepburn Act in 1906 increased the penalty for a deviation from the tariff schedules. It was therein provided:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under section 41, 42, or 43 shall be conclusively deemed to be the legal rate *and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section.*"

(Title 49 U. S. C. A. section 41.)

The tariff provisions for the payment of mileage allowances for the furnishing of cars were stipulated on the trial and are set out at pages 192 to 197 inclusive of the record. There was no change as to the mileage rate paid by the carriers during the period here involved.

During the same period the filed and published tariffs of all of the railroad lines operating out of San Francisco Bay Area, provided fixed tariffs for the transportation of such loaded tank cars from re-

spondent's plant on San Francisco Bay to all points east. On all such car movements the carriers received the full rate provided to be paid according to their tariffs, and the only mileage allowance paid by any carrier was paid to the car corporation, and at the rate of  $11\frac{1}{2}\text{¢}$  per mile strictly as provided in the said tariffs. (R. 175.) The carriers were not called upon to pay more, and they could not have paid less without being guilty of a prohibited departure from their tariffs. This follows necessarily because the rule as to car mileage was a part of the published tariffs, and could not be departed from by either carriers or shippers.

*Davis v. Henderson*, 266 U. S. 92;

*Southern Railway Co. v. Prescott*, 240 U. S. 632;

*Davis v. Cornwell*, 264 U. S. 560.

Upon the premise that the payment of the car mileage allowance to petitioner and by it to the respondent, in accordance with the written agreement of September 28, 1933, would result in a "profit" to the El Dorado Company, it is urged in petitioner's brief that the El Dorado Company would be enabled to transport its products in the leased tank cars at a lower rate than that paid by other shippers. It was stipulated in the District Court, and so testified in petitioner's behalf, that the full freight provided to be paid for transporting said cars was paid according to the applicable tariffs, and that the only allowance paid by the carriers for the furnishing of said cars was that likewise provided in the tariffs. (R. 174-175.) Neither

petitioner nor respondent paid for the transportation of said cars. As testified without conflict, respondent sold and shipped its oil in the tank cars at a price "f. o. b. cars" at respondent's plant in Berkeley. Petitioner had nothing to do with the routing of the cars, which was naturally within the control of the consignee. The carriers had no connection with the respondent or its consignees, and no connection with petitioner except in the adjustment and payment of stipulated mileage allowances according to the published tariffs. (R. 175.) There was no evidence and no claim that any of the carriers had knowledge of the existence of the agreement between respondent and petitioner. But if, as petitioner argues, the payment of the car mileage so received by petitioner, to the El Dorado Company according to the agreement of September 28, 1933, should result in an advantage to respondent it does not follow that the other shippers using cars leased from petitioner did not enjoy the same advantage. There was no evidence to show but that all shippers similarly situated received the same treatment. Regardless of this, however, it would be impracticable, even if it were possible, for the carriers to determine whether payments made in the way of mileage allowances in accordance with the published tariffs would result in a profit or loss to car lessees. Nor could they, having so determined, modify their mileage payments accordingly without departing from the rates provided in their published tariffs and to that extent violating the provisions of the Elkins Act.

Under the tariffs the carriers were authorized to pay to petitioner, as the recorded car owner, accord-

ing to the car markings, the mileage allowance of 11 $\frac{1}{2}$ ¢ per mile. They paid that and nothing more as compensation for the furnishing of the tank cars. The consignee paid the full freight rate as provided in the published tariffs. There was therefore no rebate and no discrimination, and petitioner became rightly possessed of the money and was obligated under the terms of the contract sued upon to pay it to respondent who actually furnished the cars to the railroads. It is of no legal importance that such payment might result in a profit or advantage to respondent. As was said by Mr. Justice Holmes in an opinion in a case also involving allowances paid by interstate carriers:

“The law does not attempt to equalize fortune opportunities or ability.”

(*I. C. C. v. Diffenbaugh*, 222 U. S. 42, 46.)

In advancing the argument that it could not pay to respondent, in accordance with the agreement, the mileage allowances so received from the carriers except at the peril of prosecution for violation of the Elkins Act, the car corporation loses sight of the fact that the carriers in every instance received the full rate provided to be paid under the applicable tariffs and that the moneys paid to the car corporation as mileage allowances were properly so paid according to the tariffs. The test to be applied in determining whether the section was violated is whether the terms of the statute include the act committed. There could not be conformance with the published tariffs and at the same time a violation of the cited provisions of the Elkins Act.

The contention of the car corporation that the carriers should not pay mileage allowances in excess of the car cost to the furnishers of the cars is based in part upon the quoted statements of the Commission in the investigation involving the use of refrigerator cars, and in part upon the assumption that the shipper paid, and the carriers received, less than the published tariff rate. This assumption is contrary to the stipulated facts. We have shown that under the provisions of the Interstate Commerce Act carriers may legally pay to shippers compensation in the form of mileage allowances for the furnishing of tank cars or other facilities. In the published tariffs no distinction is made between a shipper-furnisher and an owner-furnisher of tank cars. The mileage allowances provided in the tariffs to be paid were not limited to the cost or expense of furnishing the car but were fixed in accordance with the definite orders of the Commission at the flat rate of  $1\frac{1}{2}\text{¢}$  computed upon the mileage. Petitioner's argument seems to proceed on the theory that the carriers instead of paying the car mileage allowance uniformly according to the published tariffs should determine for every tank car supplied the exact cost to the supplier and limit the payment of the allowance accordingly. This would disregard the statutory requirement of uniformity and subject the carrier to a fine for each departure from the published tariff. Such a construction of the Act would require the carriers to make innumerable investigations as to the cost to the car owners or shippers of tank cars furnished by them for transportation and apart from other considerations would open

the door to all manner of discrimination prohibited by the Act, and which would result from the variable treatments of the items of cost. The Act clearly contemplated no such procedure.

In their argument on this branch of the case counsel for petitioner have taken exception to the statement in the opinion of the Circuit Court of Appeals that the mileage rates provided in the tariffs to be paid are based upon averages which assume that certain shipper-suppliers might make a profit, and that such profit does not constitute a rebate prohibited by the Act. The statement that the rates are based upon averages, etc., is abundantly supported by the findings of the Interstate Commerce Commission in "*Use of Privately Owned Refrigerator Cars*", and in fact by the excerpts quoted therefrom in petitioner's brief. The matter of cost and profit to the supplier was not directly involved in this case. It was injected by petitioner in the Circuit Court of Appeals in support of its argument that the payment by petitioner, according to its agreement, of the mileage allowance received by it from the carriers for the furnishing of the tank cars would amount to a rebate or discrimination. As we have previously shown, there could be no rebate, and no discrimination under the facts of this case, but in disposing of petitioner's contention the Circuit Court correctly stated that the car corporation "has not established that the cost of supplying the cars is less than the mileage earnings". The Court proceeded to point out that under the terms of the lease the El Dorado Company was required not

only to pay the monthly rentals for the cars, but in addition was subject to the payment of further rentals at the end of the three year period, and was also under additional expense and risk in the use of the cars. (R. 309.) This matter was further commented on by the Court in the order denying a rehearing. The opinion of the Circuit Court of Appeals was strictly correct. In its answer in the District Court petitioner pleaded, that the payment by petitioner to respondent in accordance with the agreement of September 28, 1933 was expressly prohibited and enjoined by the provisions of the Elkins Act, and that if petitioner were to pay to respondent any part of the mileage allowance received from the common carriers in excess of the car rental reserved in the agreement, such payment would result in a prohibited rebate, concession or discrimination under the Elkins Act. Petitioner tendered no issue as to the cost of the cars to the El Dorado Company. If the cost or expense of the cars to that company was in the opinion of petitioner material on the question as to whether or not there was a rebate, a discrimination or any other concession prohibited by the Elkins Act, it devolved upon petitioner to show the fact by affirmative evidence. It failed to do so.

The burden of petitioner's argument, which is stated in various forms throughout its brief, is that payment by the car corporation for mileage earnings according to its agreement with the El Dorado Company, would result in the movement by the El Dorado Company of its commodities at a rate less than that

provided in the applicable tariffs. As we have shown, the full freight rate provided by the published tariffs was paid on every movement of the tank cars for account of which the mileage allowance was paid. Moreover those charges were paid by the consignees under their purchases from the El Dorado Company. There was no payment of the freight charges either by the El Dorado Company or the car corporation. The fact, which is admitted, that for the particular period here involved the mileage allowance payable according to the published tariffs was greater than the car rental agreed to be paid by the El Dorado Company, does not establish the contention of the petitioner that the El Dorado Company enjoys any reduction in the published tariff rates—which it did not pay. It only indicates that for that period, or in respect of those particular car movements, the agreement of car lease worked to the advantage of the El Dorado Company. This was purely a profit on the car lease contract, to which no carrier was a party, and not a reduction in the freight rates paid. Inasmuch as the stipulated facts show that there was no underpayment or rebate or concession in the payment of the freight rate fixed by the published tariffs petitioner's argument, which is repeated throughout its brief, that the payment of the mileage allowance as provided in the published tariffs would result in a rebate or concession is founded entirely on the statements of the commission in its discussion in the proceeding "*Use of Privately Owned Refrigerator Cars*" which, as we have shown, was not intended to apply to

tank cars. To the extent that petitioner's argument is based upon the statements of the Court in the *Reichmann* case and *Spencer Kellogg and Sons v. United States*, which are cited in petitioner's brief, the cases themselves present the answer, because, as we shall hereafter show, in both of those cases a portion of the stipulated freight rate was repaid to a shipper, either directly or indirectly, by one actually engaged in transportation.

The Circuit Court of Appeals held that under the Interstate Commerce Act and the published tariffs, the railroad carriers may pay to shippers compensation in the way of allowances for tank cars or other instrumentalities for services furnished by the shippers. The Court's decision is supported by the opinions of this Court in *Interstate Commerce Commission v. Dittenbach*, 222 U. S. 42, and *U. S. v. B. & O. Railroad*, 231 U. S. 274, and by the specific provisions in paragraph (13) of Section 15 of the Interstate Commerce Act, for the payment of such allowances to shippers who directly or indirectly furnish cars or other facilities. The Court also held, and the parties to the present action so stipulated that appropriate tariffs providing for the payment of mileage allowances at the rate of  $1\frac{1}{2}\text{¢}$  per mile were filed and published, and that in accordance with such tariffs, which are sometimes referred to as "Rules", the carriers properly paid to the car corporation the stated mileage allowances for the use of the tank cars under lease to the El Dorado Company. That such payments to the car corporation were in compliance with the

tariffs and otherwise legal is expressly conceded at page 53 of petitioner's brief in this Court. In the absence of any decision holding that the car corporation could not legally pay to the shipper-supplier, its lessee, the mileage allowance so paid in accordance with the published tariffs, the El Dorado Company is entitled to receive such sum admittedly due to it under the terms of the car lease agreement. In substance, this was the decision of the Circuit Court of Appeals.

Except for a repeated reference to certain decisions distinguished by the Court the petitioner does not challenge any of the substantial grounds upon which the decision in the Circuit Court of Appeals proceeded. Petitioner does, however, devote a considerable portion of its brief to criticism of statements of the Circuit Court on some points which were neither necessary nor relevant to the decision. Petitioner's argument on these points proceeds, we believe, upon a misunderstanding of the opinions of the Circuit Court. Contrary to the contention reserved by counsel for petitioner at page 51 of petitioner's brief, the Circuit Court did not hold that under the applicable tariffs the car mileage was payable to the El Dorado Company nor was any such claim advanced by respondent. Nor did the Circuit Court misunderstand the car mileage tariffs or improperly refer to them in some instances as merely "rules". To the contrary the opinion expressly stated (R. 336), that the schedules which in the exhibit are listed as "Rules" are in fact the "tariffs" provided for in paragraph (13) of Section 1 of the Interstate Com-

merce Act and in Section 1 of the Elkins Act. However designated, they provided that the carriers would pay the mileage either to the car owner or to the party who has acquired the car or cars, provided the cars are properly equipped and marked with the assigned reporting marks etc. (R. 196.) The fact that this tariff provided that payment of the allowance would be made either to the car owner or the party who acquired the car clearly contemplated that the payment could be made to a shipper who acquired the cars under lease, at least up to the change in the tariff which became effective after the claims sued upon in this action had matured. All that was necessary according to the tariff and the argument of counsel for the petitioner is that the oil company, the lessee of the cars, should have had its name stenciled or marked upon the cars to entitle it to demand the mileage from the railroads. It does not appear, nor can we conceive of its being possible, that the recording by the lessee in its name of cars of which it was entitled to the exclusive possession and use, would be attended with much difficulty. It was a mere formality upon compliance with which the El Dorado Company would have been entitled to directly collect the mileage earned by the use of its cars rather than have such collection made for its use and benefit by the car corporation.

Exception is also taken to the statement in the opinion of the Circuit Court that the car corporation was the agent of the El Dorado Company in collecting the car mileage allowance, and upon this

premise it is earnestly argued by petitioner that if the payment of the car mileage allowance to the El Dorado Company was illegal that objection could not be overcome by the appointment of the car corporation as the agent of the El Dorado Company. We might agree with the statement as an abstract proposition of law, but petitioner's claim is based upon two fallacies: First the payment of the mileage to the El Dorado Company if the cars were appropriately marked was permissible and therefore not illegal, and secondly the agency referred to in the opinion of the Circuit Court is affirmatively shown by the lease contract of September 28, 1933, which is marked Exhibit "A" and attached to petitioner's answer in the District Court. (R. 20, 26.) The petitioner therein agreed to collect the mileage earned by the cars for the use and benefit of the El Dorado Company. This was clearly an agency.

As a further challenge to the decision of the Circuit Court of Appeals, petitioner takes exception to that portion of the opinion holding that if petitioner was defending against its liability to pay to the El Dorado Company the sums received and retained by it according to the lease contract, it was required to plead that payment in excess of cost of the cars to the El Dorado Company was prohibited, and to show what that cost was. No legitimate exception could be taken to this statement of the law, and petitioner has not seriously questioned it. Petitioner's argument is that the El Dorado Company failed to claim or prove costs additional to the car rental, and that the Circuit Court

assumed the existence of some additional costs. Petitioner is in error in both contentions. Petitioner pleaded the agreement under which the cars were leased as a legitimate business contract. The contract obligated petitioner to collect and pay over to respondent the mileage earned by the leased cars. It collected the money but retained it to its own use and excused its failure to perform on the plea that such payment in excess of the car rentals paid by the El Dorado Company for the cars would be unlawful and was prohibited. It clearly devolved upon petitioner to prove the total cost of the cars to the El Dorado Company and the Circuit Court properly so held. The El Dorado Company was claiming the right, according to the car lease contract, to receive the mileage when and as collected, by the car corporation from the carriers and obviously was not required to prove all of the items of cost attending upon the furnishing by it of the cars, because the contract of lease made no such provision. The contention that the Circuit Court assumed that the El Dorado Company would have some cost or expense in connection with the leased cars is answered by the provisions of the lease contract wherein the El Dorado Company assumed the cost of repairing damage or destruction to the cars on the lessee's tracks, also the replacement of the caps, valves, etc., if lost or broken; also to save the car corporation harmless for loss or damage arising through injuries to persons or property resulting from the El Dorado Company's use of said cars. (R. 25.) As pointed out by the Circuit Court, the El Dorado Company also

assumed the payment of additional rentals if at the expiration of the contract period of three years the empty mileage haul of said cars exceeded the loaded mileage. The Court was entitled to take judicial notice that cars which, as testified by Mr. Barrows of the El Dorado Company, had to be kept clean and otherwise in good condition for the transportation of edible oils would require cleaning, and that the El Dorado Company as the lessee entitled to the exclusive use of the cars would bear the expense of such necessary cleaning.

Petitioner's argument that the theory of the decision of the Circuit Court was at variance with the theory upon which the case was tried, is not only forced but wholly without merit. The decision of the Circuit Court was that the compensation paid to the car corporation for the use of tank cars was that prescribed in the applicable tariffs, and that the claim that payment of such compensation to the El Dorado Company by the car corporation was prohibited by the Elkins Act was unsound. This was the issue tendered in the car corporation's answer and this was the question directly decided and on which the judgment of the District Court was reversed. (R. 339.) The opinion of Judge Denman was "the car corporation admits that it holds \$18,532.78 which it should have paid to the El Dorado Company in several monthly payments if its contentions above stated are not sustained and the El Dorado Company agrees as to the amount involved. Having established no ground for retaining these moneys from its principal and for keeping them

for its own use the car corporation owes the El Dorado Company this amount together with interest computed on the several monthly balances making up the total record". (R. 329, 330.) This again was directly responsive to the issue tendered by the car corporation. Comments or arguments of the Court *inter alia* do not constitute the decision and cannot be invoked to support a claim that the Court decided an issue not involved.

Upon the whole case the question before the Circuit Court of Appeals and before the District Court as well was: Should the car corporation be permitted to retain the car mileage paid to it under the terms of the lease contract and in accordance with the provisions of the published tariffs, or should it be required to pay those sums over to the El Dorado Company as the user and furnisher of the tank cars in accordance with the agreement of the parties. If, as petitioner contends, such payment would yield a profit to the El Dorado Company it was a profit resulting from the lease and having nothing to do with transportation. The claim that such payment by the car corporation to the El Dorado Company would enable that company to transport its products at a cost less than that provided in the published tariffs is without foundation in fact. It was shown without conflict at the trial that the El Dorado Company used the said cars in the transportation of its coconut oil that was sold on the basis of a price f.o.b. tank cars at the El Dorado Plant in Berkeley. Accordingly the freight was not paid by the El Dorado Company but by the consignees. It was stipu-

lated that there was no arrangement of any kind between the consignees or the shippers and the carriers, and the claim of the car corporation that the payment of the particular money sued for in this action would constitute a rebate, a discrimination or a concession was too specious to be taken seriously and was therefore not accepted in the Circuit Court. If, as petitioner's brief concedes, the applicable tariffs were valid, and the payment of the mileage allowances to the car corporation was entirely proper and legal according to those tariffs, the car corporation was properly in possession of the money under the terms stated in its agreement of lease and was obligated to pay that money to the El Dorado Company. Otherwise it would have had a profit to which it was not entitled, since it did not furnish the cars to the carriers, and the El Dorado Company would be deprived of the profit to which it is entitled under the terms of the lease contract.

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## 6.

### THE CASES CITED BY PETITIONER.

In its brief petitioner has also presented the argument that the decision of the Circuit Court of Appeals is at variance with the decisions of the Courts in cases involving railroad tariffs and mileage allowances. In that connection petitioner has cited *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235, and *Spencer Kellogg and Sons v. U. S.*, 20 Fed. (2d) 459. The decision of the Circuit Court in this case is not

opposed to the decisions of either of the cited cases, and furthermore the issues and the facts of those cases differ in every material respect from those of the instant case. The *Reichmann* case only involved the propriety of a question propounded by the Commission in the course of an investigation it was authorized to make under the provisions of the Act. Nor does the opinion, from which petitioner has quoted, condemn the payment by the car owner of any portion of the mileage allowance except in the particular circumstances shown to exist in that case. The District Court did not there consider the portion of the Elkins Act relied upon by the car corporation in its defense in this action, and under which a deviation by the carrier from its published tariffs was made a criminal offense. The statutory provisions for the furnishing of cars and other instrumentalities by a shipper and for the car supplying tariff now contained in section 1 (13) of the Interstate Commerce Act were not then in existence. The facts of the *Reichmann* case, as stated in the Court's opinion were that Reichmann was the vice president of the Street Company, a car company owning a large number of cars used by the railroads in the transportation of livestock. Reichmann's company made a practice of paying to shippers a portion of the rental received by it from the railroad carriers for the use of the cars, in consideration of the use of those cars by the shipper instead of other cars that could be supplied by the railroads. The Interstate Commerce Commission under the authority conferred upon it by section 2 of the Elkins Act under-

took an investigation of a charge of abuses under the Act and in that investigation called Reichmann as a witness and asked of him what part of the mileage received by his company from the railroads for the use of its cars was paid by Reichmann's company to individual shippers. Reichmann refused to answer, and the question referred to the District Court by the Commission was as to the right of the Commission to insist upon the answer. At the outset of its opinion the District Court said:

"In considering the question I shall assume, as counsel did at the argument, that an answer by the witness would have disclosed that payments were made by the Street Company to shippers of freight, and with a view to thereby induce such shippers to demand that carriers furnish them with Street's cars for the transportation of their future shipments."

The only question before the Court in the *Reichmann* case was as to the right of the Commission to insist upon an answer to the particular question propounded to the witness. The right of the Commission to pursue the inquiry was held to follow the authority expressly conferred upon the Commission to make the investigation then in progress. The case of *Ellis v. I. C. C.*, supra, had not then been decided.

In discussing the authority of the Commission to insist upon an answer to the particular question the Court reviewed at length the history and purpose of the Interstate Commerce Act, including the Elkins Act. The comments of the Court could not change the

issues before it or extend the decision beyond the facts of the case. *As stated by the Court the car company rented its cars to the railroads. The railroads in turn furnished them, as it did other cars owned by the carriers to the shippers.* To induce shippers to use its cars as distinguished from those owned by the railroads Reichmann's car company paid to the shippers who would demand and use its cars a portion of the mileage or rental received by his company from the railroad carriers. The feature of that case which made the limitations of the Interstate Commerce Act applicable, and the feature that distinguished that case from the present one, was that the private cars were the property of the railroad carriers under the terms of the lease from the Reichmann company and were therefore instrumentalities of the railroads used in transportation. As pointed out by the Court in the portion of the opinion quoted by petitioner in its brief, the shipper received back a portion of the money paid by him as freight in consideration of his use of the particular cars which the carriers had rented from Reichmann's company and incorporated in their transportation facilities. Furthermore and as stated by the Circuit Court at the date of that decision the Hepburn Act and the statutes which are now incorporated in 49 U. S. C. A. Section 15 (13) authorizing the payment by railroad carriers to shippers for any instrumentality directly or indirectly furnished by the shippers were not then incorporated in the Interstate Commerce Act.

The case of *Spencer Kellogg and Sons v. U. S.* also cited in the brief for petitioner, grew out of the fact that Spencer Kellogg and Sons operated a grain elevator at Buffalo which was used to serve the railroad carriers in the transportation of grain from the point of original shipment to the Atlantic Seaboard. The railroads allowed the elevator company for this service 1¢ per bushel, which was included in and as a part of the through rate provided for such transportation in the published tariffs of the railroad carriers. To induce shippers to so route their grain that it would pass through the Spencer Kellogg elevators in its interstate transportation, the Kellogg Corporation allowed a rebate of  $\frac{1}{2}$ ¢ per bushel and provided for payment thereof through a broker in the City of New York. At page 461 of the opinion in the case (20 Fed. (2d)) the Court, speaking of the elevator company, said:

"This plaintiff in error, in using its elevator for transportation, performed transportation services, and effectuated the through movement of interstate shipments of grain. It was engaged in interstate traffic";

and in the closing paragraphs of the opinion, Id. page 462, the Court also said,

"The penalty is imposed here, not because it was acting for the carrier, but because it performed a service of transportation, and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

Since the elevator was itself an interstate carrier and repaid to the shipper a portion of the compensation received by it for its transportation services, there was a clear violation of the prohibitions of the Elkins Act against rebating. But neither of the parties to the present action was engaged in or concerned in transportation, and the decision of the Court in the *Spencer Kellogg* case and the reasons assigned therefor are wholly without application.

Petitioner next argues that independent of the Hepburn Amendment and prior to its enactment, interstate carriers were permitted to compensate shippers for the furnishing of cars or other services and the decision of this Court in *Mitchell Coal and Coke Company v. Penn. R. R. Co.*, 230 U. S. 247, is cited as authority. In its decision of the cited case, this Court commented on the narrowness of the statutes then in effect and upon the insufficiency of the existing tariffs in respect to the compensation payable by carriers for services rendered. The point made by petitioner is without any bearing in the present case. Admittedly the provisions of the Interstate Commerce Act in effect throughout the period covered by this action, did authorize payment by the carriers to the supplier of tank cars, whether as owner or shipper, of the mileage allowance as set out in the published tariffs. It is wholly immaterial whether the carriers were or were not so authorized prior to the Hepburn Amendment or the 1917 amendments to the Interstate Commerce Act.

The cited case of *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, does not support petitioner's argument. That case involved a "discrimination" coming within the provisions of the Elkins Act. Railroad carriers had as a part of their tariffs made allowances to certain warehouse companies for consolidating, loading and otherwise handling shipments. The favored warehouses received therefrom a financial benefit denied to other warehouses under the tariffs. The Interstate Commerce Commission, after investigation, had issued an order cancelling this feature of the tariffs in a proceeding entitled *Gallagher v. Pennsylvania Railroad Company*. The favored warehouses attacked the validity of this order of cancellation, and the Supreme Court upheld the order on the ground that the railroad carriers were not required to perform the service for which allowance was made to the warehouse companies, and accordingly that the particular tariff worked a discrimination. As before shown, the Commission has not cancelled or questioned the tank car mileage allowance tariffs and respondent is not seeking anything disallowed by the Commission.

*United States v. Koenig Coal Co.*, 270 U. S. 512 and *Armour Packing Co. v. U. S.*, 209 U. S. 56, also cited at page 58 of petitioner's brief are equally inapplicable. *U. S. v. Koenig Coal Co.*, was concerned with an indictment growing out of the fact that the defendant by means of misrepresentation obtained from the railroad companies cars for transportation of its commodities.

in excess of the number permitted by the order of the Interstate Commerce Commission. It was held that this constituted a discrimination within the prohibition of the Elkins Act.

*Armour Packing Company v. U. S.* was concerned with "devices" which might be employed to obviate the law and accomplish rebates, concessions or discriminations. Inasmuch as counsel have not claimed that the agreement sued upon constituted such a device, the *Armour* case would seem to be wholly irrelevant. The packing company was there convicted of demanding and obtaining from an interstate railroad carrier an unlawful concession of 12¢ per hundred pounds from the published tariff rates applicable to the packing company's shipments. The discrimination was accomplished by the use of through ladings covering both inland and ocean transportation. In this manner the rebate was for a time concealed.

The decision of the Circuit Court is not at variance with the views of this Court in any of the cases cited by petitioner or any other cases that our research has discovered. To the contrary, it is in strict accord with all previous decisions where there was a similarity in the issues or the facts. We might properly inject here that this is the first case where a car owner has endeavored to escape performance of its legitimate contract obligations by assumptions contrary to the stipulated facts.

The remaining points in petitioner's brief are either beside the questions before the Court, or have been already fully covered. We shall therefore refrain from

unduly extending this brief to specifically refer to them.

In conclusion, the stipulated facts show that the car corporation and the El Dorado Company (neither being engaged in transportation) entered into an agreement under which the car corporation leased to the El Dorado Company fifty tank cars to be used by the lessee in its business, for which El Dorado Company paid a monthly rental in advance and the car corporation agreed to collect the mileage earned by said cars for the account of the El Dorado Company. In compliance with the provisions of the Interstate Commerce Act the railroad carriers had filed and published tariffs in which the carriers agreed to pay to the furnisher of such tank cars an allowance of  $1\frac{1}{2}\text{¢}$  computed on a mileage basis. These tariffs and mileage allowances were binding on carriers and shippers until ordered suspended or modified by the Interstate Commerce Commission.

El Dorado Company, as the exclusive user and possessor of said cars under its lease, furnished them to the carriers for the transportation of coconut oil and the carriers received for such transportation the full rates as provided in the published tariffs. As provided in the tariffs and according to conditions therein stated, the carriers paid to the car corporation the mileage allowance of  $1\frac{1}{2}\text{¢}$  per mile. The car corporation though receiving the moneys lawfully according to the published tariffs has retained to itself \$18,532.54 which under the terms of its lease agree-

ment it was obligated to pay to the El Dorado Company.

The defense that such payment is directly prohibited is answered by the statute itself, as we have previously shown because all that was done was in strict conformance with the Act. The argument that the Commission has condemned similar payments by the owners of refrigerator cars and therefore might condemn such payments by petitioner is answered by the orders of the Commission hereinbefore noted wherein the identical mileage allowances to shippers have been approved. It is admitted that the Commission has made no order in the premises or in any manner disqualified these allowances. It is conceded in the brief for petitioner that the mileage allowances as part of the published tariffs are binding upon carriers, shippers and consignees until disaffirmed by action of the Commission and that the Courts are not authorized to change the published rates or tariffs.

The propriety of allowances by carriers to shippers for services rendered or instrumentalities furnished in the transportation of their own commodities, in accordance with filed and published tariffs has been uniformly upheld by the decisions of this Court:

*United States v. Baltimore & Ohio Ry. Co.*, 231 U. S. 274;

*Interstate Commerce Comm. v. Dittenbaugh*, 222 U. S. 42;

*Union Pacific Ry. Co. v. Uppdike Grain Co.*, 222 U. S. 215.

We therefore submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, California,  
November 29, 1939.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

\_\_\_\_\_  
No. 129.  
\_\_\_\_\_

GENERAL AMERICAN TANK CAR CORPORATION  
(a corporation),  
*Petitioner,*

v.

EL DORADO TERMINAL COMPANY  
(a corporation),  
*Respondent.*

\_\_\_\_\_  
**BRIEF FOR RESPONDENT IN ANSWER  
TO BRIEF OF INTERSTATE COMMERCE  
COMMISSION AS AMICUS CURIAE.**  
\_\_\_\_\_

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**BRIEF FOR RESPONDENT IN ANSWER  
TO BRIEF OF INTERSTATE COMMERCE  
COMMISSION AS AMICUS CURIAE.**

---

**I.**

**Answer to the Argument that the District Court Was With-  
out Jurisdiction.**

The argument of *amicus curiae* that the District Court lacked jurisdiction to entertain the suit is based upon the claim that the controversy presented a question essentially administrative in character within the exclusive jurisdiction of the Interstate Commerce Commission, and that such

question had no prior determination on the part of the Commission. In advancing this argument counsel for the Commission have overlooked the fact that the action is between two manufacturing corporations, neither of which is a carrier or engaged in transportation. The El Dorado Company sued *in assumpsit* in the State Court of California to recover money claimed to be due from the General American Tank Car Corporation. On the petition of the car corporation the action was removed to the District Court, Northern District of California, Southern Division, on the ground of diverse citizenship. The State Court had jurisdiction and under the Judicial Code, the District Court had jurisdiction upon the removal. In its answer to the complaint the car corporation pleaded that payment of the amount claimed by the El Dorado Company in accordance with the written agreement between the parties was expressly prohibited and enjoined by the provisions of the Elkins Act and that payment by the car corporation in accordance with its agreement with the El Dorado Company in excess of the car rental agreed to be paid by the El Dorado Company to the car corporation for the use of tank cars would give to the El Dorado Company a rebate concession or discrimination in violation of the provisions of the Elkins Act. It is apparent, therefore, that the action did not in its inception involve any question but the liability of the car corporation under the terms of its contract with the El Dorado Company. Of that question both the State Court and the District Court after removal had jurisdiction. The answer of the car corporation raised the question as to the effect of certain provisions of the Elkins Act upon the obligations of the car corporation under its contract with the El Dorado Company. This was primarily a question of law. It did not involve a rule or order of the Interstate Commerce Commission, or the fixing of rates or other administrative question within the jurisdiction of the Interstate Commerce Commission; nor was there involved any claim whatsoever against a railroad or

anyone engaged in interstate transportation. The car corporation did not plead invalidity of its agreement. In fact, it pleaded the agreement as a lawful commercial contract and attached a copy to its answer.

While counsel for the Commission are correct in stating that the question of jurisdiction is open for consideration in this Court, although it was not raised in the lower courts, it is settled by the decisions of this Court that the question of jurisdiction depends upon the status at the time the action is brought and jurisdiction once vested cannot be ousted by subsequent events. In the case of *Mollan et al. v. Torrance*, 9 Wheat. 537, Chief Justice Marshall announced the rule in the following language: "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time the action brought, and that after vesting it cannot be ousted by subsequent events."

Our research does not disclose that this rule has ever been departed from. On the other hand, it was expressly reaffirmed by Mr. Justice Brandeis speaking for the Court in *Minneapolis and St. Louis Railroad Company v. Peoria and Pike Co.*, 270 U. S. 580. In applying the rule in *Northwestern Bell Telephone Company v. Hilton*, as Attorney General, 274 Fed. 384, the Court said at page 390: "On the face of the complaint the cause of action within the jurisdiction of this Court is plainly stated, and the jurisdiction of the Federal Court is to be determined on the statement by the plaintiff himself in his complaint. I think that proposition is too well established to require the citation of any authorities or further discussion of the proposition." It does not appear nor is it claimed by counsel for the Commission that the original complaint was framed to conceal a question within the administrative authority of the Interstate Commerce Commission or to avoid the jurisdiction of the Commission. Inasmuch, therefore, as the District Court had jurisdiction of the controversy under the Judicial Code that Court could not have properly dismissed the action either on motion or as suggested by *amicus curiae*.

*sua sponte*. However, counsel for the Interstate Commerce Commission have, we think, with a mistaken view of the case, argued this question at some length. We shall therefore answer their argument more in detail.

The first point urged by *amicus curiae* is that the El Dorado Company as a lessee of tank cars furnished such cars to the carriers for the transportation of the oil company's coconut oil but that the carriers' tariffs did not provide for an allowance to the shipper for the use of the cars. It is true that the rules covering mileage allowances for the furnishing of tank cars as set out in the published tariffs of the railroads did not in direct terms provide for payment of such mileage to the shipper. Nor did they exclude the shipper. In effect though not in words, those provisions contemplated that payment of the mileage allowance could be made to the shipper. This is shown by the excerpts from the tariffs which are set out at pages 192-201 of the Record. The carriers in those rules undertook to pay for the furnishing of tank cars at  $1\frac{1}{2}\text{¢}$  per mile "to the owner or the party who has acquired" \* \* \* the car or cars provided the cars are properly equipped and marked with reporting marks. The essential feature of this rule is that the carriers agree to pay the mileage for the furnishing of the cars either to the owner or to the party who having temporary title or use supplies the cars. Of necessity, this must include the shipper who could not use the car for the shipment of its property without being in the class of "a party who has acquired the car." That the tariffs were so understood by the Commission as well as the carriers is shown by the statements of the Commission which are quoted in the brief of *amicus curiae*. In fact, counsel for the Commission in their brief expressly concede that the El Dorado Company as the lessee and shipper of the tank cars would be entitled under the tariffs to receive, and could lawfully collect, the mileage allowances if it had caused its name to be stenciled upon the cars and so reported. *Amicus curiae* also admit that the reservation in the tariffs for payments ac-

eording to reporting marks was intended only for the protection and convenience of the carriers. There can be no question of the right of a shipper to claim compensation in the form of allowance by the carrier for the furnishing of tank cars or other instrumentalities used by the carrier in transportation. It is so provided in Section 15 (13) of the Interstate Commerce Act quoted at page 11 of the brief of *amicus curiae*. Counsel for the Commission also urge that under the tariffs mileage allowance was not payable to the car corporation as the owner of the cars because the shipper alone furnished the cars to the carriers. This contention does not follow from the reading of the tariff rules which provide *inter alia* for the payment of the mileage to the car owner notwithstanding the signing and reporting of marks in the name of the shipper. Neither the El Dorado Company as plaintiff nor the car corporation as defendant in the District Court sought any recovery from the railroad carriers or made any claims as against them. As between parties litigant and the carriers the rules of the published tariffs were accepted without question. And, since there was no issue as to the fairness of the tariffs or as to the reasonableness of the mileage allowance provided in the rule to be paid, there was no administrative question for the Commission to determine and the cases cited by counsel for the Commission are without point. We will concede that if there were question as to the fairness of the tariff provision, or the reasonableness of the allowance therein made for the furnishing of cars, or if a shipper or car owner were claiming compensation from the carrier for the furnishing of cars or other instrumentalities contrary to or in excess of that provided in the published tariffs, the question would be one of administration or rate fixing and within the primary jurisdiction of the Interstate Commerce Commission. But no such question is presented in this case. The only issue is between the El Dorado Company as the lessee of the tank cars and the car corporation as the lessor of the cars. The car corporation denied liability under its con-

tract solely upon the ground as pleaded that performance of its admitted obligations was prohibited by the provisions of the Elkins Act. It did not question the effectiveness or reasonableness of the tariff rules nor did it deny the receipt by it thereunder of the stipulated mileage allowance. The question of liability was a purely legal question within the jurisdiction of the courts and not for the primary determination by the Interstate Commerce Commission. *Amicus curiae* do not claim for the Interstate Commerce Commission jurisdiction to hear or determine the rights or obligations under contracts in no manner connected with transportation by carriers. In fact, under the ruling of this Court in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, the Commission has no jurisdiction over the dealings of car-owning companies that are not carriers or shippers. The Commission itself has recognized the limitations upon its authority in its order of April 27, 1939, in the proceeding entitled "Investigation and Suspension Docket No. 4572, Refrigerator Car Mileage Allowances" wherein it was held that the Commission is without jurisdiction to determine the reasonableness of the compensation to be made by the carriers themselves to car-owning companies. If a car-owning company is not accountable to the administrative control of the Commission in respect of contracts with the railroad carriers, it obviously is not subject to such control by the Commission in respect of its contracts with those who are not carriers. Otherwise, the Commission would have authority to control the price at which car companies manufacture and sell their cars.

It would seem entirely clear, therefore, that the claim advanced by *amicus curiae* that the District Court was without jurisdiction fails, not only because the District Court had jurisdiction but because the Interstate Commerce Commission did not under the facts of the case have any administrative authority or jurisdiction.

It is next urged by counsel for the Commission that where a shipper furnishes services or instrumentalities to a car-

rier for which the published tariffs do not provide compensation, the shipper must institute proceedings before the Interstate Commerce Commission for recovery of a reasonable allowance. We do not question the rulings of the Commission and the decision of the courts that since the Act requires the filing and publication of all tariff rates and allowances no allowance may be legally paid that is not provided for in the filed and published tariffs. The Commission has also upon occasion fixed the allowance to be paid for switching and for car services but this is referable to the authority conferred upon the Commission by the Interstate Commerce Act to investigate the reasonableness and fairness of all tariffs and rules of the railroad carriers and either upon complaint or on its own initiative to modify, suspend, or cancel such tariffs. But this jurisdiction, which *amicus curiae* speak of as "a primary jurisdiction in all controversies involving administrative questions" does not extend to the relation between non-carrier manufacturing corporations under a contract in no manner connected with transportation and where no carrier was in any way involved. The Commission's only concern with privately-owned cars results from their use in transportation and as said by this Court, in *Ellis v. Interstate Commerce Commission*, *supra*, "Control of the Interstate Commerce Commission over private cars is to be effected by its control over the railroads that are subject to the Act." Inasmuch as respondent El Dorado Company is not seeking recovery or making any claim against the railroad carriers for any allowance, application to the Interstate Commerce Commission for an order enlarging or changing the published tariffs so as to specifically provide for such payment would not only be futile but wholly unwarranted. The fact that such an application might be made, as suggested by *amicus curiae*, in a proper case, does not establish the authority, administrative or judicial, of the Interstate Commerce Commission in this case; or warrant the claim that the District Court was in any manner divested of its civil jurisdiction.

Pursuing the same thought, counsel for the Commission argue that the Commission has made no determination as to what would be a reasonable allowance to the shipper under circumstances shown by the Record in this case. As before stated that question is not present. The shipper is not asking any compensation or allowance from the carrier. It is an admitted fact that the carriers are paying only one mileage allowance for the furnishing of the cars which amount is that provided in the published tariffs. Neither party to the action is seeking any compensation from the carriers. Nobody, not even the Commission, has challenged the reasonableness of the tariff mileage allowance. If as *amicus curiae* claim, the Commission has made no determination as to the mileage allowance of  $1\frac{1}{2}$  cents, it is nevertheless true that the Commission had under the Act complete authority either on complaint or on its own initiative to investigate the reasonableness of such mileage allowance and suspend, modify or cancel the same. In its report *In the Matter of Private Cars*, 50 I. C. C. 652, the Commission expressly approved the practice of paying such mileage to the furnisher of tank cars, whether owner or shipper, and as counsel for the Commission state the 1 cent mileage previously approved was increased to  $1\frac{1}{2}$  cents by the action of the carriers in 1926 and was then incorporated in the filed and published tariffs and has been effective ever since. It accordingly had the force and effect of a statute and was binding, (*Pennsylvania Railroad Company v. International Coal Co.*, 230 U. S. 184), whether or not the Commission had made any official determination as to the reasonableness of the allowance. The fact that over the intervening 13 years the Commission with ample authority to make such investigation failed to do so, is persuasive evidence of its acceptance of that rate of allowance as just and reasonable.

*Amicus curiae* next make the point that because, as they argue, the mileage allowance was not payable to the El Dorado Company as a shipper, it does not represent a reason-

able allowance to the shipper for the reason that the payments sought by the El Dorado Company from the car corporation were condemned by the Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars", 201 I. C. C. 323. As herein above pointed out payments by the carriers to the El Dorado Company as shipper are not involved in this case. None has been made and none is claimed. It is therefore wholly unimportant whether such payments would be reasonable or unreasonable. The rate of such mileage and the practice of paying it to a shipper was, we believe, approved by the above cited reports of the Commission. In their brief *amicus curiae* claimed otherwise, but urge that this is immaterial in view of the expression of the Commission in *Use of Privately Owned Refrigerator Cars; supra*. If counsel are correct in this last assertion they are in error in claiming that the Commission has made no determination of the question of the reasonableness of the mileage allowance. The report of the Commission in the *Refrigerator Car case* is in the Record. The payments "condemned" as counsel say were those that the carriers could pay to shippers under the terms of the published tariffs (R. 150-158). Others were not involved or even considered and no mention was made in the condemnation of payments by a car owner to the car lessee under the terms of a contract of lease. Furthermore, the Refrigerator Car proceeding did not involve mileage payments for the use of tank cars which as the Commission there states the carriers could not furnish and the findings and the order of the Commission made thereon were expressly limited to refrigerator cars. As to tank cars the Commission held that the evidence was not comprehensive enough to warrant a conclusion (R. 139). Accordingly, the report of the Commission specifically referring to tank cars *In the Matter of Private Cars*, 50 I. C. C. 652, *supra*, represented together with its acceptance over a period of 13 years of the mileage increase made by the carriers must be held to be the Commission's determination that such al-

lowances are just and reasonable. The propriety of payment to the shipper was definitely recognized by the Commission and the validity of such payments to a lessee as distinguished from an owner was recognized by this Court in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, (a case cited by *amicus curiae*) where this Court held that under the Act there is nothing to prevent the claimant hiring instead of owning the instrumentality by him furnished to the carriers.

The whole argument of *amicus curiae* on the question of jurisdiction of the District Court as summarized at page 11 of their brief reduces down to the point that because the Commission would have the primary right of determination of a claim, which was not asserted in this case against railroad carriers for tank cars furnished by a shipper-lessee, the District Court must lose jurisdiction already vested and to which it was entitled under the Judicial Code of an action for money alleged to be due under a contract in which the carriers have no interest and which of itself had nothing to do with transportation. We believe the contentions of *amicus curiae* are readily answered by the decision of Chief Justice Marshall in *Mollan v. Torrance*, *supra*, and also by the fact, which the Record discloses, that this action does not involve a question within the administrative authority of the Commission or over which the Commission has any jurisdiction.

## II.

**Answer to the Argument that Payment by Private Car Line to a Shipper of Any Part of the Mileage Allowances Received from the Carrier in Excess of the Rental Such Shippers Paid to the Car Line, Etc., Results in Such Shipper Obtaining Transportation at Less than the Established Tariff Rate.**

This was in substance the claim of the Petitioner in the lower courts. It was definitely rejected by the Circuit Court of Appeals and the Petitioner was adjudged liable for the amounts due to be paid by it as provided in its contract for car lease with the Respondent. It is clear that to sustain such a defense the stipulated payment must be prohibited by the letter of the Act or contrary to, and therefore not authorized by, the published tariffs of the railroad carriers. The contention which was urged by Petitioner in its defense in the District Court and again in the Circuit Court of Appeals that payment by the Car Corporation of mileage earned by the tank cars in excess of the car rental paid by Respondent for such cars is expressly prohibited by the provisions of the Elkins Act is answered by the Act itself, which contains no such prohibition and makes no reference whatever to car mileage allowances or car costs. The car mileage allowance schedules, which are a part of the published tariffs and are shown in the Record on pages 190 to 201, likewise contain no reference to car rentals as between car owner and the shipper, or to the disposition of moneys after payment thereof by carriers for the furnishing of cars or other instrumentalities. The tariffs, therefore, do not prohibit payment by the car owner, Petitioner here, of the mileage received in accordance with its agreement and, as held by the Circuit Court, the defenses set up by the Car Corporation failed.

Counsel for the Interstate Commerce Commission, in discussing the merits of the case, approach the question from somewhat different angle. Their first point is that the

carriers have a primary duty to furnish cars for transportation purposes. We do not dispute this, but we do claim, and our position in that is supported apparently by *amicus curiae*, that where the carriers permit shippers to furnish cars or other instrumentalities for transportation purposes, the shipper is entitled to demand and receive from the carriers just and reasonable compensation for the services or facilities so furnished. This is expressly authorized by the Interstate Commerce Act, Par. 15 (13) and also by the findings and order of the Interstate Commerce Commission following its investigation in 1918 *In the matter of Private Cars*, 50 I. C. C. 652. The Commission there expressly determined, after a very full investigation, that the practice, then twenty years old, whereby shippers leased or rented cars and furnished them to interstate carriers for transportation purposes, receiving an allowance computed on the basis of mileage hauled, loaded and empty, should be continued. The mileage rate then in effect was ordered increased and thereafter, in 1926, it was increased to the present mileage rate of  $1\frac{1}{2}$ ¢ per mile. The Commission made no order, rule or regulation denying shippers the privilege of furnishing tank cars and, upon compliance with the rules as to car markings, receiving the mileage allowance provided to be paid according to the tariffs.

The Commission in its findings and order *In the Matter of Private Cars* recognized and made mention of the fact that uniform rates, which are essential, would of necessity result in some shippers enjoying benefits and profits. Notwithstanding that the carriers were directed to continue the payment of mileage allowances to the shippers furnishing cars. But counsel for the Interstate Commerce Commission apparently claim that although under the Act and the railroad tariffs the carriers may pay the mileage allowances to the car owner furnishing cars or to a shipper so furnishing them if the appropriate reporting marks are stenciled on the cars, yet the car owner may not pay to its lessee, the shipper, any part of the car mileage so received

in excess of the car rental. Since the car-owning companies, like the Petitioner in the instant case, are not engaged in transportation, their charges for the rental of cars furnished to shippers are not a part of the published tariffs but are arrived at by private negotiation. There does not seem to be a sound reason for upholding the payment by a car owner of the mileage received from a carrier for the furnishing of tank cars up to the amount of the rental paid by the lessee for such cars, but denying the legality of any payment in excess of such car rental. In either case the shipper may have an advantage over other shippers. If he had paid a high rental he would get a larger refund of mileage earned from the car owner than would his neighbor who had paid a smaller car rental. Such a construction of the law and of the relations between carriers, car owners and shippers would result in there being as many car mileage rates as there were car owners and shippers, and the carriers would be called upon in the case of every private car furnished by a lessee to determine the cost of that individual car to the shipper so furnishing it and to limit mileage payments accordingly.

The Interstate Commerce Act and the Elkins Act amendatory thereof aimed to prohibit rebates, discriminations or concessions on the part of a carrier, or anyone acting in its behalf, whereby a shipper would secure transportation of his products at less than the freight rate fixed in the filed and published tariffs of the railroad carriers, but it was not the purpose of the Act, as was said by Mr. Justice Holmes in speaking for this Court in a case involving rates for supplying grain elevator facilities, to attempt "to equalize fortune, opportunities or abilities" (*Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46). The Commission evidently had the same thought in mind in making its orders *In the matter of Private Cars, supra*.

Counsel for the Commission rest their argument that payments by a car owner to a shipper of mileage allowances should be limited to the car rental paid, almost entirely

**MICRO CARD**

TRADE

MARK



**22**

**39**



**65**



**1173**

upon the findings of the Commission in the proceeding entitled *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. On the authority of excerpted passages from those findings, counsel for the Commission apparently contend that an agreement is unlawful under which a car owner leases cars to a shipper upon the understanding that the car owner would collect the mileage allowances provided in the published tariffs for the credit of the shipper. This is outside the issue tendered by the Car Corporation in the District Court, and is also contrary to the claims of the Car Corporation in the Circuit Court of Appeals and in this Court.

It is not claimed that the Commission held such agreements to be unlawful, but rather that the payment of mileage so received in excess of the car rental for the use of refrigerator cars was condemned in that proceeding by the Commission and therefore the car lease contract between two non-carriers covering tank cars should be held unlawful by this Court, thereby enabling the Car Corporation to retain to itself a large part of the mileage allowance earned by the cars held under lease by the Oil Company. The carriers would gain nothing because they would pay the same mileage. The same freight rates would be paid, as they have been in the past, to the full extent of the published tariffs. The Oil Company would pay the same monthly rental for the cars as provided in its lease, but would not receive the mileage allowance as stipulated in said lease. The Car Corporation, on the other hand, would retain all of the mileage allowance notwithstanding it had received in advance its stipulated monthly car rentals from its lessee.

Counsel for the Commission quote at length from the findings in the *Refrigerator Car Case* to show that under leasing arrangements covering refrigerator cars substantial profits might be realized by shippers at the expense of the interstate carriers. Special mention is made of the fact that other shippers obtaining cars from the same or other

car lines might be less fortunate in not obtaining as favorable terms, etc.

In the closing paragraph of its findings and as its conclusion from the evidence the Commission said, "We do not undertake to say that a carrier may not accept private cars, if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper-lessee, which results in the payment by such shipper of charges less than the published tariff rate."

This conclusion is not applicable to the present case. The Commission was there dealing with the mileage for cars rented by the carriers from the car owners and the payment to the shipper of any part of the car mileage would in effect be a refund in part of freight earned by the facility acquired and used by the carrier. As shown by the findings of the Commission in that proceeding also the railroad carriers were stocked with refrigerator cars sufficient to meet the demands of shippers. When, therefore, a shipper used a privately owned refrigerator car, he to that extent reduced the potential earnings of the carrier whose refrigerator car remained idle. To the extent that the shipper could acquire for his uses a privately owned refrigerator car at less cost to himself than he could obtain a corresponding car from the railroad carriers, he secured a benefit in the nature of a prohibited discrimination. No such result was claimed or was possible in the present case. It was shown without conflict and in fact stipulated (R. 201), that the Transcontinental Freight Bureau's tariff covering freight rates for shipments in tank cars provided that the carriers did not obligate themselves to furnish tank cars. The reason for this is further explained by the testimony of the representatives of all western railroads operating out of the San Francisco Bay area. They testified that their several companies did not have the cars, either in the quantity or with the equipment re-

quired; to meet the demands of the El Dorado Oil Company for the transportation of its coconut oil, or the demands of other vegetable oil producers. They did not hold themselves out to furnish the cars for the reason that they did not have them and could not furnish them (R. 165-170).

Furthermore, the Commission in *The Use of Privately Owned Refrigerator Cars*, after referring to the fact that the carriers do not hold themselves out to furnish tank cars to shippers and do not own or lease sufficient tank cars to enable them to do so, etc., said of the evidence before it in respect of the use of tank cars and mileage earnings thereon, etc., "That is not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars attend the use of private tank cars."

If the evidence was not sufficient to warrant a decision, it would be natural that the decision would be limited in so far as tank cars are concerned. In that behalf the Commission, in the closing pages of its report on *The Use of Privately Owned Refrigerator Cars* made the following observation:

"The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted but the general principles enunciated apply equally to all other types of cars."

The resulting order dismissed the proceedings as to all cars other than refrigerator cars and ordered the carriers to cancel certain schedules under suspension in respect to mileage allowances on refrigerator cars. Therefore, the findings and the order of the Commission were restricted to refrigerator cars and were given no effect whatever as to tank cars or the disposition of mileage allowances for the use of them. Quite properly the Circuit Court treated the remarks of the Commission in so far as they referred to tank cars as being *dicta* only.

The Commission has no real interest in the outcome of this case and the brief submitted in its behalf is directed

chiefly to apply the general principles announced by the Commission in its consideration of *The Use of Privately Owned Refrigerator Cars* to the wholly different state of facts disclosed by the record in the instant case. Respondent's position is that this case is confined within the issues as presented in the lower courts and that the Interstate Commerce Commission may not by appearance in this Court change those issues or present a case different from that before the lower court as disclosed by the record. In the District Court the Car Corporation admitted the execution of the agreement and its liability thereunder, but justified its refusal to perform on the ground that payment of the mileage allowances received by it under the published tariffs was expressly prohibited and enjoined by the Elkins Act. If, as held by the Circuit Court of Appeals, neither the Elkins Act nor the published railroad tariffs prohibit the Car Corporation from paying to Respondent the car mileage allowances so received, the Commission may nevertheless investigate the effect of such payments, looking beyond the form of the agreement, as *amicus curiae* say, and make such order as may be considered proper. Any such order would be binding upon the carriers because they are at all times within the administrative control of the Commission. In such an investigation the Commission could determine to what extent, if at all, it may control the dealings between a car owner (not engaged in transportation) and a car user; also whether the allowances paid by carriers for cars furnished to them must be determined on the basis of the car rental cost to the shipper or on a uniform basis provided in the tariffs, as held by the Commission in *the Matter of Private Cars, supra*. The authority for such investigation by the Commission is given by statute and would be open to the Commission regardless of the outcome of this case. Counsel for the Commission correctly state that the Circuit Court of Appeals did not pass upon those questions, but neither the District Court nor the Circuit Court was required or permitted under the issues to

pass upon those questions and we submit that this Court may not properly do so upon the record before it. Counsel for the Commission claim that those questions are administrative in character and call for primary determination by the Commission. On that premise, the lower courts quite properly did not pass upon them and there was no error on the part of the Circuit Court of Appeals in failing so to do.

The Circuit Court of Appeals referred to the report of the Commission *In the Matter of Private Cars, supra*, as a determination that shippers as well as owners of tank cars, could supply them to the railroads and receive compensation in the way of mileage allowance therefor in conformity with the published tariffs and that these orders were made in the face of the apparent knowledge on the part of the Commission that such practice then in general use would on occasion result in inequalities between shippers and possible abuses.

Counsel for the Commission take exception to certain comments of the Circuit Court, but the review by *amicus curiae* of that report agrees in substance with the views of the Circuit Court of Appeals and passages quoted in the brief for the Commission fully sustain the views of the Circuit Court.

Counsel for the Commission argue that the findings of the Commission *In the Use of Privately Owned Refrigerator Cars* is not inconsistent with the action of the Commission *In the Matter of Private Cars*, and complain that the Circuit Court "seem to give full consideration to the earlier report and overlook the salutary principle established in the second report."

If, as claimed, there was no inconsistency in the reports, such action on the part of the Court would be obviously of no effect, but to justify the Commission's appearance in this case and its attempt to broaden the inquiry to include issues not before the Court, Counsel are forced to take the position, which in effect they have taken in their brief, that

the action of the Commission *In the Use of Privately Owned Refrigerator Cars* has a bearing on this case. This, of course, disposes of the claim advanced in the first section of the brief of *amicus curiae* that the Commission has made no determination of the right of a shipper-lessee to receive through car owners mileage allowances earned on the leased cars. But if, as counsel for the Commission claim, the observations of the Commission *In the Use of Privately Owned Refrigerator Cars* is to be accepted as a declaratory action of the Commission, they must nevertheless be circumscribed in their authoritative effect by the limitations which were expressly placed thereon by the Commission. Not only was the order of the Commission limited to refrigerator cars and the proceeding as to all of the cars dismissed, but the Commission itself limited its findings to refrigerator cars and as to tank cars held that the evidence was not comprehensive enough to warrant any conclusion on the part of the Commission.

The Commission is authorized by the Act to investigate such matters whether on complaint or on its own initiative and thereafter to make orders or rules. Its action is reflected by such orders or rules and not by informal observations or comments. Counsel for the Commission have endeavored in the brief to give to such comments, notwithstanding the limitation placed thereon by the Commission, the force of a formal order by the Commission. We submit that the formal order of the Commission, based upon its full investigation *In the Matter of Private Cars*, represented a considered judgment of the Commission and is effective both in its permissive and directory provisions until modified by formal action of the Commission after investigation, or until changed by statute. The statements of the Commission, in its review of the evidence before it *In the Use of Privately Owned Refrigerator Cars*, especially when limited as above stated by the action of the Commission to refrigerator cars, did not destroy the effect

of the Commission's action *In the Matter of Private Cars* and the Circuit Court of Appeals properly so held.

But however considered, the observations of the Commission quoted or referred to in the brief filed by *amicus curiae* are entitled to no weight in this case where the question of the reasonableness of the car rental as fixed by the parties in the car lease agreement was not an issue. Both parties stand upon the agreement as written. Counsel for the Commission have endeavored to fit the findings of the Commission *In the Use of Privately Owned Refrigerator Cars* to the present case, and in doing so have indulged in various assumptions as to the facts and have drawn inferences therefrom which have no support in the evidence. Primarily it was agreed in the Trial Court that on every movement of the tank cars in question the carriers received the full freight provided to be paid in the applicable tariffs. Therefore, the finding which is quoted at page 25 of the brief filed by *amicus curiae* is inapplicable because the criticism there made was based upon the premise that the shipper transported his property at less than the published tariff rates.

The statements of the Commission *In the Use of Privately Owned Refrigerator Cars* that certain practices therein mentioned would result in profits to the shipper-lessee are likewise without application here. The brief for *amicus curiae* admits that there was no evidence in the present case as to the cost of the cars to the El Dorado Company. The Car Corporation submitted no evidence in the District Court as to the cost to the Respondent of the tank cars by it furnished for the transportation of its coconut oil. The Car Corporation offered no such defense. The Oil Company stood upon the agreement and since the Car Corporation's only defense was that payment by it as provided in the lease was expressly prohibited by the Elkins Act the Oil Company was not called upon to prove the cost of the cars or the expense to which it was put to supply them. The Circuit Court properly held that if the Car Cor-

position desired to defend upon the ground that the agreement was unlawful or that performance on its part was excused because the payments agreed to be made were in excess of the car cost to Respondent, the Car Corporation should have tendered the issue and proved the facts.

In the circumstances, we think no good purpose would be served by specific reference to the various statements in the brief of *amicus curiae* of the general tenor that under the terms of its contract with the Car Corporation Respondent was able to realize a profit on the use of the leased tank cars. The intimation of *amicus curiae* that Respondent may have realized profits on cars covered by other leases or at periods different from that covered by the present action is, of course, pure assumption; and the statement that other shippers using cars also leased from the Car Corporation may have been less fortunate would seem entirely unwarranted in the light of the admitted fact in the record that the Car Corporation's tank cars were open to lease and in fact were leased by other manufacturers of coconut oil on the same terms. It is unnecessary for us to say that railroad tariffs were admittedly uniform, that is, the same for all shippers, and the mileage allowance paid by the carriers to the Car Corporation for the use of these particular cars was paid and payable under the published tariffs to all other car suppliers.

On the assumption that because Respondent seeks recovery of a substantial amount in this case the whole of that amount may be considered profit, counsel for the Commission state that this indicates that the terms of the Car Corporation's lease to Respondent were too liberal. This we believe is not a matter that concerns the Commission. The administrative authority of the Commission under the Interstate Commerce Act does not extend to non-transportation activities of the car manufacturing company. It has no authority to pass judgment upon the price at which car manufacturers may sell their cars or lease them. Because it is not engaged in transportation, the Car Corporation is

not required to file with the Commission or publish its charges. Until the private car is used by a carrier or becomes an instrumentality in interstate transportation, the interest and administrative authority of the Commission does not exist, and when that interest does arise the control of the Commission is to be exercised through its authority over the interstate carrier, as was held by this Court in *Ellis v. Interstate Commerce Commission*, 237 U. S. 432.

Premised on the assumption that the Car Corporation might make other contracts for the lease of its cars for less liberal terms than those granted Respondent, counsel for the Commission argue that there would result such an inequality as was condemned by this Court in *United States v. Union Stock Yards*, 226 U. S. 286. This does not follow at all. The *Union Stock Yards* case was entirely different. There a company engaged with others in interstate transportation agreed to pay a packing company a bonus which was not provided for in the filed and published tariffs. This was held to be a preference within the prohibition of the Elkins Act. We may concede that a payment of such bonus by a carrier that was not provided for in the published tariffs would be a violation of the Interstate Commerce Act and that such a payment to one shipper, and not to all, would constitute a discrimination within the prohibitions of the Elkins Act. But counsel for the Commission may not properly assume, without the warrant of any evidence, that the Car Corporation made less favorable leases to others than it did to Respondent and from that deduce that this case would come within the rule announced in *United States v. Union Stock Yards*.

At page 29 of the Commission's brief *amicus curiae* cite cases holding, it is claimed, that a shipper who has no capital investment in cars but obtains them through leases secures transportation at less than the tariff rates in violation of the statute. It is of no present importance whether the holding of the Commission *In the Use of Privately Owned Refrigerator Cars* is supported by the authority cited be-

cause, as we have shown, the action of the Commission in the refrigerator car matter has no bearing upon the present case, but the cases which counsel have cited do not sustain their point. We have already referred to the *Union Stock Yards* case. *Chicago & Alton R. R. v. Kirby* held invalid a contract whereby a railroad carrier agreed to move a shipper's cars by a particular train, thereby granting a preference over other shippers. *Davis v. Cornwell*, another of the cited cases, held illegal a contract by a railroad carrier for the furnishing of special cars. In each of the other cases cited there was some such element of preference or discrimination on the part of a carrier that was subject to criticism under the Interstate Commerce Act.

The whole argument of counsel for the Commission in respect of profits accruing to Respondent under its car lease is speculative and is based upon what might be termed probable or assumed profits, and upon the theory that the El Dorado Company might, if the Car Corporation shall make the payments as provided in the car lease agreement, secure transportation of its coconut oil at less than the published rates. No one will deny the authority of the Commission to investigate and act in such event, but because of that assumed possibility counsel for the Commission are not permitted to ignore the facts shown by the record in this case.

Respondent's coconut oil was sold on the basis of a contract price f. o. b. cars Berkeley. The consignees, not the shipper, paid the full freight provided to be so paid under the applicable tariffs. The Car Corporation, which had nothing to do with the routing of the cars or the shipment of the oil, collected from the carriers and still retains the exact mileage provided in the published tariffs to be paid, to the amount and for the period covered by the present action. As to the sum involved in this action, therefore, there is no foundation for the claim, on any theory whatsoever, that Respondent Oil Company has secured transportation or could, if the payment were made, secure transportation at

a rate less than that provided in the published tariffs. The Car Corporation properly has made no such claim and there is no justification for it on the part of counsel for the Commission.

Counsel for the Commission differ with the Court of Appeals as to the effect of certain provisions of the car lease agreement. The matters of difference are wholly immaterial. The Court's comments occur in its discussion of the Oil Company's expenses incident to the handling of the leased cars. That question was not an issue in the case and was only referred to by the Circuit Court in response to arguments advanced by the appellee before that Court. But, without disrespect to *amicus curiae*, we may be permitted to say that what the parties understood by their contract may well be left to them and their understanding was adequately shown by what they did under the contract.

The Car Corporation has not claimed a failure or want of consideration or any illegality or insufficiency in the car lease contract. On the other hand, in defending against Respondent's action for money claimed to be due to it in the District Court, the Car Corporation pleaded the contract.

Referring to a statement in the opinion of the Circuit Court of Appeals that the El Dorado Company was obligated under its lease for the tank cars to take possession thereof and provide trackage facilities, *amicus curiae* urge that there is no evidence upon this subject and that generally shippers using private side tracks or intra-plant tracks in preference to carriers' team tracks are usually required to pay for them. The statement of the Circuit Court was made in the course of its discussion of the question of the Oil Company's expense, which was not an issue in the case. The car lease agreement did, however, require the oil company to maintain its possession of such cars and to save the Car Corporation, as the lessor, against all liabilities for injury to the cars, or to persons or property while said cars are on the privately owned trackage

of the Oil Company. Therefore, the statement of the Circuit Court was warranted by the agreement itself. Whether or not Respondent would be required under the railroad tariffs to pay the railroads for demurrage or trackage charges is not an issue in the case and is not even pertinent to the claims advanced by counsel for the Commission.

Equally without application are the cases of *Warehouse Co. v. United States* and *United States v. American Tin Plate Corp.*, cited in the brief for the Commission. In the first named case, this Court considered an attack upon an order of the Commission by certain warehouse companies who, under a published tariff, received from the Pennsylvania Railroad Co. compensation for consolidating express matter for railroad shipment. Other warehouses similarly situated objected to the preference and the Interstate Commerce Commission sustained them, on the ground that though the published tariffs provided for the allowance as required by the Interstate Commerce Act, the allowance was in itself a preferential discrimination and within the prohibitions of the Act. Similarly, in the cited case of *United States v. American Tin Plate Corp.*, the Commission had made its ruling with respect to allowances provided for in the published tariffs. We cannot see the relevancy of either of these cases. No action of the Commission was under attack in the lower courts or drawn in question by the Circuit Court of Appeals, nor is it claimed that any provision of the published tariffs works a discrimination or preference. Apparently counsel for *amicus curiae* cited those cases to warrant the interest of the Commission in the present action. The Respondent does not question the rule that if a tariff does work a rebate, a discrimination or a concession within the prohibitions of the Interstate Commerce Act, it may be set aside on the application of the Commission regardless of the length of time it has been in effect. As we have heretofore stated, the Commission has an un-

deniable right to act in such contingencies. But we believe it has no authority, administrative or otherwise, over the parties litigant in this action or any interest in the controversy.

At page 40 of the brief for the Commission reference is made to the Commission's report *In Refrigerator Car Mileage Allowances*, decided April 27, 1939. This matter was decided after the decision in the Circuit Court of Appeals. Its relevancy to the present action is not apparent. As reviewed in the Commission's brief it discloses that the Commission claims that it has no jurisdiction over agreements for car allowances as between a carrier and a car-owning company, not a shipper. In other words, it is held that a carrier is not required under the language of the Interstate Commerce Act to publish in its tariffs the fact that it is paying, or the amount it is paying, to car companies for the rental or use of cars where such car companies are not shippers, or shipper-owned or controlled. Whether the action of the Commission in that matter modified or obviated the order *In the Use of Privately Owned Refrigerator Cars*, *supra*, which order specifically refers to such contracts between the carrier and car companies, is a question of no moment in this case. As has been stated, tank car uses and allowances were expressly exempted from the order in the former refrigerator car proceeding.

The argument advanced by *amicus curiae* that because the Commission is without jurisdiction in the circumstances disclosed *In Refrigerator Car Mileage Allowances*, *supra*, payment by a car corporation of a portion of the mileage to a shipper accomplishes a rebate prohibited by the Elkins Act is both unsound and superficial. As we have heretofore shown, the facts of the instant case disclose that there was no rebate or discrimination as to any of the shipments in respect to which the allowances involved in this action were paid. In the brief heretofore filed by Respondent in answer to the brief of Petitioner, we have, we believe, sufficiently shown that on the issues and the evidence before

the Court the judgment of the Circuit Court of Appeals should be affirmed.

In concluding this brief in reply to that submitted by the Interstate Commerce Commission as *amicus curiae*, we submit that the District Court had adequate and complete jurisdiction to hear and determine this case on the pleadings. Every element to make up the jurisdiction under the Judicial Code was present and the Court having taken jurisdiction could not be divested of it by any subsequent event. *Amicus curiae* claim that an administrative question within the primary jurisdiction of the Interstate Commerce Commission was involved and therefore the District Court lost its jurisdiction. The defense plea by the Car Corporation that notwithstanding its agreement it should not be required to pay the money as claimed by Respondent because such payment was expressly prohibited by the Elkins Act, did not raise an issue or present a question within the administrative jurisdiction of the Interstate Commerce Commission. There was no question of rates or regulation. The answer raised a single question of law as to the meaning of the Elkins Act. That was not a question within the administrative or the primary jurisdiction of the Interstate Commerce Commission. It was a question purely within the jurisdiction of the Court. Therefore, the contention of counsel for the Commission that the action should be dismissed must be denied.

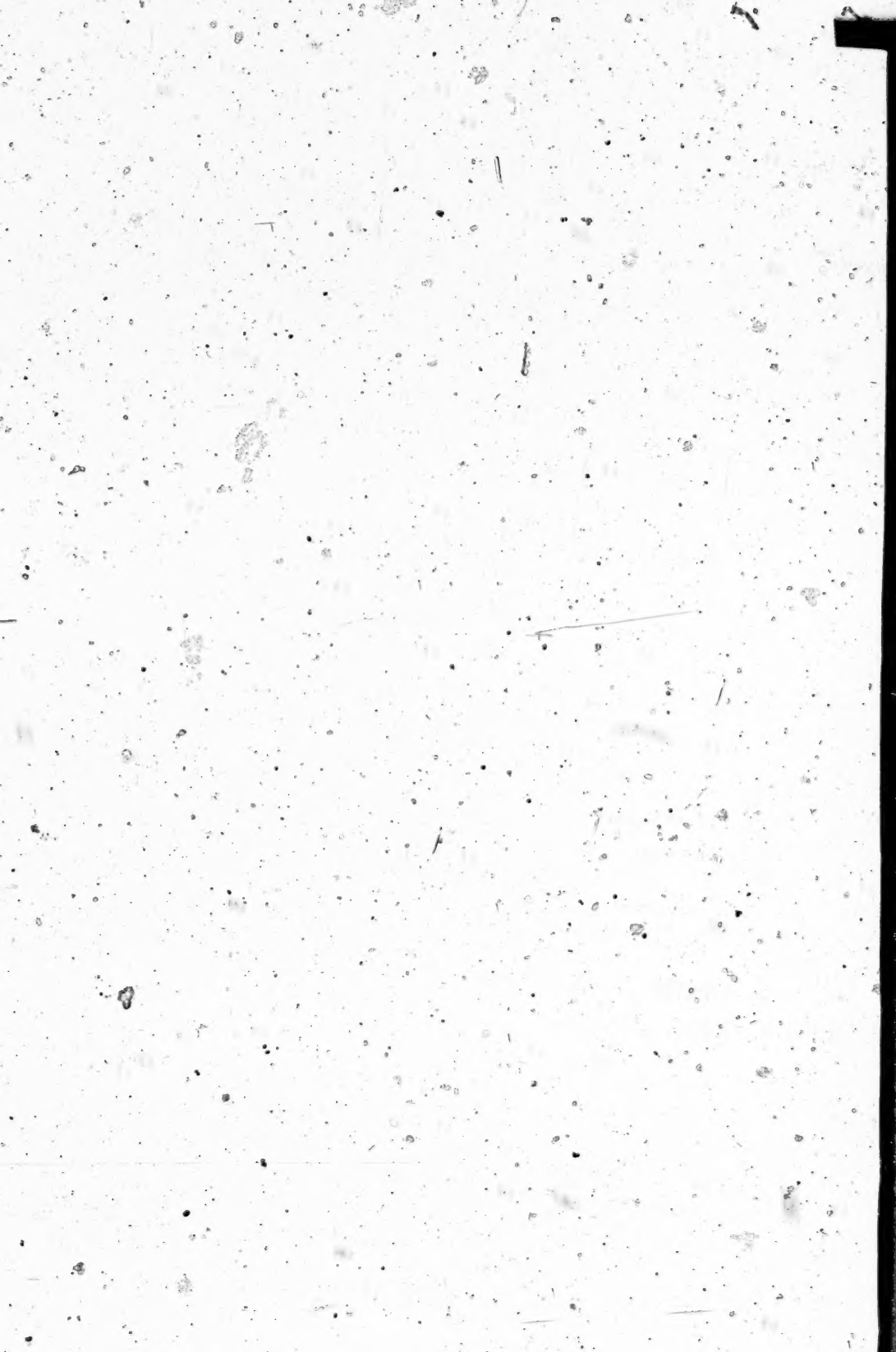
The brief filed in behalf of the Interstate Commerce Commission does not disclose that it has any real interest in the controversy. The case does not involve the making, the interpretation or the enforcement of a tariff, or any other question within the administrative or primary control of the Commission. The litigating parties recognize and claim to be abiding by the published tariffs. The carriers are in no manner interested. The only question is as to whether the prohibition of the Elkins Act in the facts of this case can be availed of by the Car Corporation to avoid payment by it according to the terms of its car lease

agreement of the amounts which it has received under the tariffs and still retains. The Circuit Court of Appeals held that the prohibitions of the Elkins Act were not applicable to this case and that Respondent was entitled to judgment. We submit that decision should be affirmed. Such affirmation would have no effect upon the authority of the Interstate Commerce Commission to take such action as it might desire in the way of investigation and corrective orders if it has any question as to the propriety of the existing tariffs and if it should conclude that it has jurisdiction over the commercial dealings, wholly distinct from transportation, of a car owner and a car lessee.

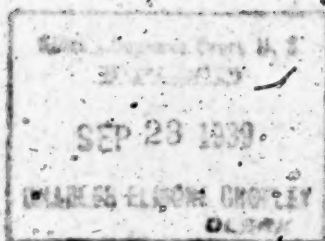
Respectfully submitted,

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FILE COPY



No. 129

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**In the Supreme Court of the United States**

OCTOBER TERM, 1939

---

GENERAL AMERICAN TANK CAR CORPORATION, PETITIONER

v.

EL DORADO TERMINAL COMPANY

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

---

MEMORANDUM OF UNITED STATES AND INTERSTATE COMMERCE COMMISSION, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---



# **In the Supreme Court of the United States**

**OCTOBER TERM, 1939**

---

**No. 129**

**GENERAL AMERICAN TANK CAR CORPORATION,  
PETITIONER**

**v.**

**EL DORADO TERMINAL COMPANY**

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT**

---

**MEMORANDUM OF UNITED STATES AND INTERSTATE  
COMMERCE COMMISSION, AS AMICI CURIAE, IN SUP-  
PORT OF PETITION FOR WRIT OF CERTIORARI**

The United States and Interstate Commerce Commission have an interest in this controversy because of their statutory duties to administer and enforce the Interstate Commerce Act, certain provisions of which have been disregarded or erroneously interpreted and applied by the Circuit Court of Appeals. The rulings of that court depart from established interpretations of important sections of the Act, and produce confusion and uncertainty in the enforcement and application of those sections.

(1)

Respondent<sup>1</sup> leased tank cars from the petitioner, an independent car company. Respondent furnished these leased cars to common carriers by railroad for use in transporting respondent's interstate shipments of coconut oil. The common carriers paid the petitioner certain mileage allowances for the use of the cars and the petitioner paid these allowances over to the respondent, but only to the extent of the rental paid by the respondent for the cars. Respondent thereupon brought this suit against petitioner to recover the remainder of the allowances received by petitioner on the ground that it was entitled, under the provisions of its contract with the petitioner, to the full amount of the allowances received by the petitioner.

The court below held (104 F. (2d) 903) that respondent was entitled to recover from petitioner mileage allowances of \$18,532.78, representing the excess of the compensation received by petitioner from the railroads over the car rentals. In so holding, the court decided that the excess of the allowance over the respondent's rental expense did not constitute an unlawful rebate or concession to the shipper from the published rates paid by it to the railroads for the transportation of its coconut oil.

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<sup>1</sup> The term "respondent" is used herein to designate both the El Dorado Terminal Company, the plaintiff, and the El Dorado Oil Works, its parent company. The alleged cause of action arose in favor of the parent company, which assigned it to its subsidiary.

The court below further held that these allowances might lawfully be received by respondent notwithstanding the fact that the published tariffs of the railroads made no provision for an allowance to the shipper but instead expressly provided that the mileage allowances for the use of privately owned cars would be paid only to the owner of the cars or to the company whose "reporting marks" were stenciled or painted on the cars. The cars in question were owned by the petitioner, a private and independent company, and they bore petitioner's "reporting marks." Consequently, under the tariff provisions, no allowances were payable to the shipper. The allowances were actually paid to the petitioner, despite the fact that it was not the shipper and had not furnished the cars to the railroads.

In rendering this decision, the court below apparently assumed that the District Court had jurisdiction to determine the allowance which the shipper should receive. The Interstate Commerce Act, however, gives the Interstate Commerce Commission exclusive jurisdiction to determine the amount which a shipper is entitled to receive when there is no published tariff providing for an allowance to it for cars which it furnishes but does not own. Under Section 6 (1) and (7) of the Act, no allowance may lawfully be paid to a shipper unless the allowance is published in the carrier's tariff. The shipper's recourse is to secure an al-

allowance by Commission authorization pursuant to Section 15 (13). That section provides (49 U. S. C. Sec. 15 (13)):

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

The reasonableness of the allowance in question, at the rate of 11½ cents for each mile that each of the cars moved, loaded or empty, over the railroad lines, was not presented to or determined by the Commission.

## II

The petition for certiorari specifies several reasons for allowance of the writ. The discussion thereof in the brief in support of the petition reveals the substantial interest of the Interstate Commerce Commission and of the United States in the questions presented. Particularly important in the administration of the Interstate Commerce Act is the question of whether the receipt by the ship-

per of mileage allowances for leased cars in excess of the rental paid by the shipper for the cars constitutes an unlawful rebate or concession, or gives the shipper an advantage in respect to its shipments in violation of the Elkins Act. The decision of the court below is contrary to the principle established by the Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, and until the question is authoritatively decided by this Court, the Commission will be unable to determine how to administer the Act in this respect.

But there are reasons, other than those specified in the petition, why we believe the writ should be granted. The first is the question of the jurisdiction of the court below to consider the questions which it decided. We have pointed out above that the published tariffs of the railroads made no provision for an allowance to a shipper furnishing cars which it did not own and which did not bear its "reporting marks." No allowance, therefore, should be made by the carriers to the shipper under their tariffs, and the shipper should receive its allowance only by authorization of the Commission pursuant to Section 15 (13) of the Interstate Commerce Act, above quoted.

The Commission has not determined the reasonableness of the allowance or fixed the amount thereof, and in entering judgment for the respondent prior to such determination by the Commission, the

court below has, we believe, usurped the exclusive administrative power expressly conferred upon the Commission by the Act.<sup>2</sup>

The assumption and exercise of jurisdiction in this case is in direct conflict with many decisions of this Court. In *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, this Court held that it was without jurisdiction of a suit for damages based, among other things, upon alleged unreasonable allowances, saying at pages 263-264:

In case any question arose as to the reasonableness of the practice \* \* \* or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body.

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<sup>2</sup> This question of jurisdiction was not raised or considered in either of the courts below. Nevertheless, the courts below should have declined *sua sponte* to proceed with the cause. *United States v. Corrick*, 298 U. S. 435. Neither the United States nor the Commission was a party to the proceedings there, nor was this case brought to their attention until after the opinion of the Circuit Court of Appeals had been rendered.

In *Loomis v. Lehigh Valley R. R.*, 240 U. S. 43, a shipper sued in a state court, without preliminary resort to the Commission, to recover, as damages, his expense incurred in installing inside grain doors in box cars furnished by the carrier for transportation of grain. The carrier's tariffs did not provide for payments or allowances for grain doors. In affirming the judgment of the state court that it was without jurisdiction of the suit this Court stated (p. 50):

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry. v. United States*, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. \* \* \*

The foregoing quotations merely reiterate the jurisdictional principles first established in *Texas*

*& Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, a decision from which this Court has never departed. See also *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Warehouse Co. v. United States*, 283 U. S. 501, and *Finkbine Lumber Co. v. Gulf & S. I. R. Co.*, 269 Fed. 933 (C. C. A. 5th), certiorari denied, 255 U. S. 574.

In addition to the jurisdictional question, we believe that the writ should be granted because the decision of the court below that a shipper may lawfully receive an allowance made by a common carrier by railroad despite the lack of express tariff provision therefor, is contrary to the provisions of Section 6 (1) and (7) of the Interstate Commerce Act. These sections require publication of rates and of "all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered," and provide that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. \* \* \*." The decision below, disregarding these sections of the Act, is contrary to many decisions

of this Court, of other federal courts and of the Interstate Commerce Commission. *United States v. Chicago & A. Ry. Co.*, 148 Fed. 646 (D. C. N. D. Ill.), affirmed, 156 Fed. 558 (C. C. A. 7th), affirmed, 212 U. S. 563; *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, 202 Fed. 845 (C. C. A. 8th); *Terminal Allowance, etc.*, 192 I. C. C. 67, 69; *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, 13; *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237, 242; *Victor Fuel Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 119; compare *United States v. Am. Sheet & Tin Plate Co.*, 301 U. S. 402, 408; *Warehouse Co. v. United States*, 283 U. S. 501, 511; *Fourche R. R. Co. v. Bryant Lbr. Co.*, 230 U. S. 316; *Southern Cotton Oil Co. v. Central of Georgia Ry. Co.*, 228 Fed. 335 (C. C. A. 5th).

Under the provisions of the Interstate Commerce Act, and of the Elkins Act which supplements and reinforces it (c. 708, 32 Stat. 847, c. 3591, 34 Stat. 587, U. S. C., Title 49, Secs. 41-43), the primary method by which discriminations are sought to be prevented and uniformity secured is the requirement that rates be published and strictly adhered to. *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co. v. United States*, 209 U. S. 56, 72. The decision below contravenes this cardinal principle of regulation.

## III

The case involves important questions of unusual consequence in the enforcement and administration of the Interstate Commerce Act and the Elkins Act which have not been but should be settled by this Court. The petition should, therefore, be granted.

Respectfully submitted.

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SEPTEMBER 1939.





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No. 129

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*In the Supreme Court of the United States*

OCTOBER TERM, 1939

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GENERAL AMERICAN TANK CAR CORPORATION;  
PETITIONER

v.

EL DORADO TERMINAL COMPANY, RESPONDENT

---

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION,  
AS AMICUS CURIAE

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I. In the absence of a published allowance payable to the shipper, who furnished the cars in question, no allowance could lawfully be paid to it by the carriers, and the shipper's only recourse was to institute a proceeding before the Commission, which has exclusive primary jurisdiction to determine a reasonable allowance. Therefore the District Court was without jurisdiction to entertain this suit.

10

II. Payment by a private car line to a shipper of any part of the mileage allowances received from the carrier in excess of the rental such shippers pay to the car line and other actual expenses incurred by the shipper in connection with the cars results in such shipper obtaining transportation at less than the established tariff rate.

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# In the Supreme Court of the United States

OCTOBER TERM, 1939

---

No. 129

GENERAL AMERICAN TANK CAR CORPORATION,  
PETITIONER

v.

EL DORADO TERMINAL COMPANY, RESPONDENT

---

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION,  
AS AMICUS CURIAE

---

The Interstate Commerce Commission respectfully submits this brief as *amicus curiae* because of its interest in the important questions presented, involving interpretation of the provisions of the Interstate Commerce Act and of the Elkins Act in their application to leases of private cars, and also because it believes the case involves an important jurisdictional question.

In our memorandum in support of the petition for writ of certiorari we suggested lack of jurisdiction in the District Court to entertain the suit, on

the ground that the controversy presented a question essentially administrative in character, involving determination of a reasonable allowance for transportation services performed by the shipper, and that without a prior determination of this question by the Commission, the court lacked jurisdiction.

No question as to jurisdiction was raised or considered in either of the courts below.<sup>1</sup> It appears, however, the question is open to consideration by this Court, upon its own motion. In *United States v. Corrick*, 298 U. S. 435, 440, this Court, holding the District Court to be without jurisdiction in that suit, said:

“The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a Federal court touching the subject matter of the litigation cannot be waived by the parties, and the District Court should, therefore, have declined *sua sponte* to proceed with the cause. [Citing cases.]”

This brief, therefore, after a statement of the essential facts, submits argument first upon the question of jurisdiction, followed by argument upon the merits for consideration if the jurisdictional point be deemed not well taken.

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<sup>1</sup> Neither the United States nor the Interstate Commerce Commission was a party to the proceedings below, nor did this case come to the attention of either until after the opinion of the Circuit Court of Appeals had been rendered.

## FACTS

Petitioner, herein called the car company, is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products. (R. 30, 173-176.) It is an "independent" company, not affiliated by stock ownership or otherwise with any railroad company. (R. 34, 48.) It is what is known as a "private car line".<sup>2</sup> It is not a common carrier and is not subject to regulation under the Interstate Commerce Act as such. *Ellis v. Int. Com. Comm.*, 237 U. S. 434. Its business, so far as letting cars is concerned, seems to be similar in general aspects to that of the Armour Car lines held not to be subject to the Act in the *Ellis Case*, supra.<sup>3</sup>

The respondent, El Dorado Terminal Company, is a wholly owned and controlled subsidiary of the

<sup>2</sup> A term used to designate organizations or corporations supported by private, as distinguished from railroad, capital that control or own a number of cars which they place in the service of railroads or shippers, and whose principal income is derived from compensation for the use of such cars. *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 326.

<sup>3</sup> In its report of a comprehensive investigation *In the Matter of Private Cars*, 50 I. C. C. 652 (1918), the Commission made the following findings of fact as to the General American Tank Car Corporation, p. 676:

"The General American Tank Car Corporation owns about 5,000 tank cars which are leased to shippers for use in general service of transportation of liquids. The larger number of its cars are continuously used for the transportation of petroleum oils, but many of them are of special

El Dorado Oil Works, a corporation engaged in the production, and shipment in interstate commerce; of coconut oil, operating a large plant at Berkeley, Calif. (R. 3, 5, 30, 47, 169.) The El Dorado Oil Works is herein called the shipper.

On September 28, 1933, the car company and the shipper entered into an agreement under which the former leased to the shipper 50 tank cars, designated as "permanent" cars, at a rental of \$27.50 per car per month. (R. 20, 22, 31.) This lease, a renewal of a previous one, was for the three-year period from January 1, 1934 to December 31, 1936. (R. 21.) At the time it was entered into, the 50 cars in question were in the possession of the shipper, under the terms of the prior agreement, which expired December 31, 1933. (R. 21.)

The car company further agreed to supply the shipper with such additional tank cars as it might need for the shipment of its products, these addi-

design and used to transport acids, wines, cottonseed and coconut oil, etc. \* \* \*

In its later report in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, also a general investigation, the Commission found, pp. 366-367:

"The General American Tank Car Corporation and its subsidiaries, the Union Refrigerator Transit Company, Quaker City Refrigerator Line, and General American Transportation System \* \* \* own over 8,000 cars that were designed for handling dairy products, fruit, vegetables, and other perishables. About 612 of these cars are leased to, and 636 assigned to, the exclusive use of shippers of dairy products, and 3,886, which are suitable for such traffic, are under contract to the railroads. The others are in the service of meat packers."

tional cars to be ordered by the shipper from the car company from time to time, as needed, and returned to the car company at Berkeley or Oakland, Calif., when no longer needed. (R. 21, 23, 31, 173.) The rental for these additional cars was at the rate of \$30 per car per month for the time such cars were in the service of the shipper. (R. 23.)

The agreement provided that the car company would "collect all mileage earned by the cars covered by this agreement" and "each month credit to the rental or service account" of the shipper "all mileage earned by said cars while in the service" of the shipper "according to and subject to all rules of the tariffs of the railroads." (R. 26.)

The shipper agreed not to hire or use any other tank cars than those belonging to the car company. It further agreed to assume certain obligations, e. g., to be responsible for damage or destruction to the cars while on any privately owned tracks. (R. 25.) The cost of repairs to the cars and all maintenance thereof was to be borne by the car company. (R. 24-25.)

The cars were used by the shipper for the transportation of its shipments of coconut oil in interstate commerce from Berkeley, principally to eastern points. (R. 31-32, 169, 172.) It appears that the oil in question solidifies at a temperature below about 85° to 95° F., and for this reason it is convenient that the tank cars used for its transportation be equipped with coils for the application of steam to liquefy the oil, to facilitate unloading.

(R. 169-170.) It appears that the railroads serving the shipper's plant at Berkeley<sup>4</sup> are not prepared at all times to furnish shippers a full supply of tank cars of this type. (R. 163-168, 175.)

Their published tariffs, though naming rates on this commodity when shipped in tank cars, disclaim obligation to furnish cars of that type. (R. 163, 201.)

The tariffs of the carriers,<sup>5</sup> though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the shipper under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars.<sup>6</sup> (R. 191-201.) It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the car company. (R. 21.) The mileage was not, therefore,

<sup>4</sup> The principal transcontinental railroads whose lines reach and serve this plant are the Southern Pacific Co., Western Pacific R. R. Co., and Atchison, Topeka & Santa Fe Ry. Co.

<sup>5</sup> I. C. C. 2692 and reissues, published by the American Railway Association, on behalf of practically all the Class I carriers in the United States and thus having virtually national application.

<sup>6</sup> These reporting marks consist of certain letters, e. g., in the case of this car company, "G. A. T. X." followed by the designated car number.

under the terms of the tariff, payable to the shipper. (These tariff rules are considered in detail later, *infra*, pages 11-13.)

The terms of the agreement were observed for a period of approximately six months (R. 47-48), until July 2, 1934, on which date the Interstate Commerce Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I.C. C. 323 (set out in full in the record, R. 49-162) in which it held, pages 378-381 (R. 150-158), that the payment in whole or in part to shippers of mileage allowances by railroads, either direct or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

After the issuance of this decision by the Commission, the car company refused to credit or pay over to the shipper any part of the mileage allowances in excess of the rental reserved in the lease. (R. 48.) Until that time the practice had been for the car company to collect the mileage, deduct the rental due, and pay the balance to the shipper. Thereafter, the car company collected the mileage from the railroads, credited the shipper with the amount of the rental due, and retained the balance, refusing to pay it over to the shipper on the ground that if it did so it would be the instrumentality for

the granting of concessions or rebates to the shipper. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the shipper. Throughout the entire period, therefore, the shipper paid nothing to the car company for the use of the cars. (R. 172.)

On June 19, 1935, the El Dorado Terminal Company, as assignee of its parent company (R. 5, 30, 190), brought this suit against the car company to recover the balances of the mileage allowances alleged to be due to the shipper *for the period up to May 31, 1935*. It was stipulated by counsel (R. 45-48) and found by the trial court (R. 33-34) that during the 7-month period from November 1, 1934, to May 31, 1935, the car company collected and received from the railroads mileage allowances aggregating \$28,595.79 and credited thereof \$10,981.66 to the account of the shipper, leaving a balance of \$17,614.13. There was also a stipulation and finding as to the earlier period from January 1, 1934, the effective date of the lease in question, to October 31, 1934, on which date the shipper made the assignment to the El Dorado Terminal Company. During this period the car company collected and received from the railroad companies mileage allowances aggregating \$22,807.79 and credited thereof \$21,889.14 to the account of the shipper, leaving a balance of \$918.65. (R. 33, 46.)

It was during this period (July, 1934) that the practice of paying the shipper the full mileage al-

allowances was discontinued. There is no clear explanation in the record as to why any period prior to that change in practice was included.

The case was tried October 28, 1936, and February 27, 1937 (R. 39), the latter date after the expiration of the three-year period of the particular lease in question, but no evidence was submitted to show the mileage allowances or any other facts relating to the period of the lease subsequent to May 31, 1935 (except two unexplained ledger sheets, R. 186, 187, covering items during the period from June 1, 1935, to December 1, 1935). Nor was any evidence submitted to show the outcome of the prior lease or leases except the following statement by the car company's assistant comptroller:

"During the period covered by the contract it was the practice to send our vouchers to El Dorado Oil Works in settlement of the balances due from time to time. *This occurred over a long period of years.*" (R. 181; italics ours.)

Nor does it appear whether there was a renewal of the lease which expired December 31, 1936.

There is no evidence to show that the 7-month period from November 1, 1934 to May 31, 1935, during which the mileage allowances exceeded the car rental by \$17,614.33, was abnormal in any respect. Possibly it may be assumed, therefore, that the mileage continued to be in excess of the rental in about the same proportion during the

remaining 19 months that the lease was due to run and that a further suit has been instituted by the shipper to recover the balancees.

*If such a suit has been instituted it will undoubtedly be governed by the decision herein.*

### ARGUMENT

I. In the absence of a published allowance payable to the shipper, who furnished the cars in question, no allowance could lawfully be paid to it by the carriers, and the shipper's only recourse was to institute a proceeding before the Commission, which has exclusive primary jurisdiction to determine a reasonable allowance. Therefore the District Court was without jurisdiction to entertain this suit.

The Circuit Court of Appeals held, correctly we believe, that the shipper, not the car company, furnished the cars in question to the railroads. The shipper leased the cars in question from the car company, under the terms of an instrument to which the railroads were not a party. When it was ready to make shipments, it loaded the cars in question with its products, and tendered the loaded cars to the railroads for transportation. They accepted the loaded cars and transported them to destination. Under these circumstances, it is difficult to perceive how it could be said that the car company supplied the cars to the railroads. It seems clear that the shipper furnished them. Having thus furnished instrumentalities used in the carriers' transportation, it was entitled to a reasonable allowance therefore under section 15

(13) of the Interstate Commerce Act, which provides:

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

*But the carriers' tariffs did not provide for an allowance to the shipper for the use of these cars.* The only allowance published therein throughout the period here in question was one payable only to the owners of the cars or to the party whose "reporting marks" appeared thereon. The shipper was not the owner of the cars in question; they were owned by the car company, and they bore the latter's reporting marks. Pertinent excerpts from the tariffs are in the record. (R. 192-201.) By reference thereto it will be noted that prior to April 1, 1935, they provided that the mileage would be paid either "to the car owner or to the party

who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks", subject to the qualification that "Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car." (R. 192-197.)

Since either acquirement or ownership was to be identified by the reporting marks painted or stenciled on the cars, the plain purport of this provision was that the mileage would be paid only to the party whose reporting marks so appeared upon the cars: in this case the car company, not the shipper.

On April 1, 1935, the provision was amended to read as follows (R. 197-201):

"Mileage for the use of cars of private ownership will be paid for loaded and empty movement only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number \* \* \*."

So that under the tariffs in effect both prior and subsequent to April 1, 1935, the mileage was not payable to this shipper, for two reasons, first, the reporting marks on the cars were those of the car company and not the shipper's, second, the shipper was not the owner but the lessee of the cars.

Apparently the particular wording of the allowance provision took into consideration the convenience of the carriers, who apparently sought to avoid the responsibility of tracing leases and perhaps subleases in order to pay the mileage to the right

party. But the plain effect of the rule, in its application to cars leased by a car company to a shipper, was to preclude the payment to the real party who furnished the cars. While possibly the rule sought to discourage leases, it could not legally forbid them. Nor does the rule set up a relation of agency as between the railroad and the car company for the payment of the mileage to the actual car furnisher through the intermediary of the car company. None of the railroads was a party to the agreement between the car company and the shipper; and there is no evidence of any privity between the railroads and either the car company or the shipper. (See R. 174).

The allowances in question in this suit were paid by the railroads to the car company despite the fact that it did not provide any facilities or render any services to the railroads for which an allowance was due. Apparently the railroads have a cause of action against the car company for the recovery of these allowances.

In the absence of a provision in the carriers' tariffs showing the fact and amount of the allowance to be paid to the shipper, no allowance was lawfully payable to it, except under an order of the

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It is important to observe in this connection that this rule has appropriate application in instances where the carrier leases or rents cars from either independent private car lines or separately incorporated railroad-controlled car lines, as is often done, as indicated in *Use of Privately Owned Refrigerator Cars*, *supra*, pages 326, 347, 351, 352, 377, 382 (R. 56, 94, 95, 102, 103, 148, 159).

Commission, in view of the provisions of Section 6, paragraphs (1) and (7), of the Interstate Commerce Act, which require publication of rates and of "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered," and provide that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The Commission and the courts have consistently so held. In an early case, *Victor Fuel Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 119 (1908), the Commission held, page 120:

"\* \* \* Complainant claims that tariff publication of the allowance in question is not required by the act, and consequently defendant may lawfully pay at the 50-cent rate for car-door boards supplied before the effective date of the tariff announcing the increased allowance.

This presents the question whether the allowance may lawfully be paid without provision therefor in defendant's tariffs. It seems clear to us that this question must be answered in the negative. The requirement of section 6 that the schedules posted and filed shall contain 'any rules or regulations

which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee, plainly requires publication of allowances of this character."

Other early Commission cases to the same effect are *General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237, 242; *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, 13. In a recent case, *Terminal Allowance for Switching at Humboldt, Kans.*, 192 I. C. C. 67 (1933), in which the Commission found not justified schedules proposing an allowance to a shipper at Humboldt, Kans., similar to the spotting allowances condemned in *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, 209 I. C. C. 11 (sustained in *United States v. American Tin Plate Co.*, 301 U. S. 402), the Commission held, at page 69:

"This allowance was not published in tariff form as required by section 6 of the Interstate Commerce Act until schedules herein suspended were filed. The failure to publish the allowance in a tariff filed with us, and the payment thereof in the absence of such publication, were in violation of the Interstate Commerce Act and the Elkins Act. *Waste Merchants Association of New York v. Director General et al.*, 57 I. C. C. 686, 689, order sustained in *Interstate Commerce*

*Commission v. United States Ex Rel.*, 260 U. S. 32, 34; *Wisconsin Central Ry. Co. et al. v. United States*, 169 Fed. 76; *Omaha Elevator Co. v. Union Pacific R. R. Co. and Union Pacific R. R. Co. v. Omaha Elevator Co.*, 249 Fed. 827, 832. \* \* \*."

Other court cases so holding are *United States v. Chicago & A. Ry. Co.*, 148 F. 646, affirmed 156 F. 558 (7th C. C. A.), and, *per curiam*, 212 U. S. 563; *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, 202 F. 845; *Southern Cotton Oil Co. v. C. of G. Ry. Co.*, 228 F. 335 (5th C. C. A.); compare *Warehouse Co. v. United States*, 283 U. S. 501, 511; *Fourche R. R. Co. v. Bryant Lumber Co.*, 230 U. S. 316; *Lambert Run Coal Co. v. Balto. & Ohio R. R. Co.*, 258 U. S. 377.

Where a shipper performs part of the carrier's transportation service or furnishes an instrumentality of transportation which may not lawfully be immediately compensated by the carrier because of the absence of a published allowance therefor, his recourse is to institute a proceeding before the Interstate Commerce Commission for the recovery of a reasonable allowance.

Under the decisions of this Court in *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, *Loomis v. Lehigh Valley R. R.*, 240 U. S. 43, and many others, the Commission has exclusive primary jurisdiction to determine the reasonable allowance in such a case, on the ground that the function is pri-

marily that of rate-making, and is administrative in character. These decisions rest upon the familiar principle established by this Court in the *Abilene* case (*Texas & Pac. Ry. v. Abilene Co.*, 204 U. S. 429), that primary jurisdiction in all controversies involving administrative questions lies exclusively in the Interstate Commerce Commission, a principle adhered to by this Court in numerous subsequent decisions including *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. B. & O.*, 222 U. S. 506; *U. S. v. Pacific & Arctic Ry.*, 228 U. S. 87; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304; *Penna. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121.

The Commission has made no determination as to what would be a reasonable allowance to the shipper under circumstances such as those shown by the record here. It is true that in its report *In the Matter of Private Cars*, 50 I. C. C. 652, the Commission found in 1918 that the then existing mileage allowance of  $\frac{3}{4}$  cent for the use of tank cars should be increased to 1 cent per mile. It is now immaterial whether that mileage would have been payable either directly or through car companies in the case of a lease by the shipper from a car company, because, in its report in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, the Commission condemned the payment under such circumstances of any amount in excess of the ship-

per's cost.\* It has not subsequently modified this rule. About 1926 the 1-cent mileage was increased to 1½ cents by the voluntary action of the carriers. The Commission has had no occasion to pass upon the reasonableness of this increased allowance in its general application throughout the country. By the terms of the tariff publishing this mileage, it was not payable to this shipper for the reasons stated above. It does not represent a reasonable allowance to this shipper for the reason that such payments under the circumstances here shown were condemned by the Commission in *Use of Privately Owned Refrigerator Cars, supra*.

To summarize: The District Court was without jurisdiction to entertain this suit for the reasons, (a) the shipper supplied the cars in question to the railroads and it was therefore entitled to a reasonable allowance, but (b) there was no provision published in the carriers' tariffs providing for any allowance to the shipper under the facts shown of record; therefore, (c) the shipper's only recourse was to institute a proceeding before the Interstate Commerce Commission for the determination and recovery of a reasonable allowance, (d) primary jurisdiction to make such determination lies exclusively with the Interstate Commerce Commis-

\* Cf. *Interstate Com. Comm. v. Duffenbaugh*, 222 U. S. 42, 45, 47, 48-49, involving the validity of an order in which the Commission fixed an elevation allowance at ¾ cent per bushel "estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate." This part of the order was sustained.

sion, which has made no determination as to what would be the amount of a reasonable allowance to the shipper under circumstances such as those shown by this record.

**II. Payment by a private car line to a shipper of any part of the mileage allowances received from the carrier in excess of the rental such shippers pay to the car line and other actual expenses incurred by the shipper in connection with the cars results in such shipper obtaining transportation at less than the established tariff rate.**

The duty to furnish cars for transportation rests primarily upon the carrier. The Interstate Commerce Act, in section 1 (3), defines the term "transportation" as used in the Act as including *inter alia* vehicles and all instrumentalities and facilities of shipment or carriage. It then provides, in section 1 (4), that it shall be the duty of carriers to provide such transportation upon reasonable request. *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199; *Director General v. Viscose Co.*, 254 U. S. 498; *In the Matter of Private Cars*, 50 I. C. C. 652, 671; *Lake-Rail Butter and Egg Rates*, 29 I. C. C. 45.

Prior to 1917, the Commission was without full authority to enforce this duty. In *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208 (1916), this Court held that under the Act as it then stood the Commission lacked power, in the absence of discrimination, to require a carrier which owned no tank cars to obtain a supply of such cars for furnishing to shippers who desired to ship oil and

other liquids in cars of that type. After such authority had been conferred by the Esch Car Service Act of 1917 (40 Stat. 101, adding to the Interstate Commerce Act the provisions now appearing as paragraphs 10 to 17, inclusive, of section 1) the Commission gave consideration, in its investigation *In the Matter of Private Cars*, 50 I. C. C. 652, to the question whether the carriers should be required to furnish cars of special types such as refrigerator and tank cars to the exclusion of privately owned cars. It found that an important part of the interstate commerce of the country is transported in privately owned cars and that it is to the interest of the owners, carriers, and public that their operation should be continued, under such rules and regulations as will insure their efficient handling without discrimination against any shipper or particular description of traffic. It was then recognized, and still is, that the use of private cars was attended with abuses, and the Commission has endeavored by rulings and otherwise to lessen such abuses as far as possible.

In 1931, on its own motion, the Commission instituted an investigation designated *Practices of Carriers Affecting Operating Revenues or Expenses*, Part V of which, entitled *Private Freight Cars*, dealt with conditions surrounding and attending the use of cars owned or operated by persons or corporations other than common carriers by railroad but including carrier-controlled corporations. In its report in that proceeding, with

which was consolidated an investigation and suspension proceeding, entitled *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (1934); the Commission gave consideration to certain proposed tariff rules and regulations governing the use of privately owned refrigerator cars and to the subject of private cars generally, and in particular, to leases of private cars by private car lines to railroads and to shippers. Certain shippers were protestants in the proceeding and presented testimony but none of them, the Commission found, "own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the tariff rates." (201 I. C. C., 375.) It further found that "A car line, whether it be shipper or not, can not be expected to build, maintain, and supply cars to the railroads unless it may reasonably expect to obtain a fair return on its investment. In fact, they could not obtain the necessary capital under any other conditions." But as to shippers who own no cars, but lease or otherwise obtain cars through a car line, the Commission held:

"A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than

that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act." (201 I. C. C., at 378; R. 151.)

At the hearing held in that proceeding the majority of the shippers who rented or leased cars and most of the private car lines refused to divulge the amounts paid to or retained by said car lines, the shippers refusing on the ground that they did not feel warranted in doing so without the consent of the car lines, while the car lines refused on the ground that they could not afford to do so because of the keen competition between them.

Sufficient evidence was adduced, however, to indicate that substantial profits may be derived by shippers through such leasing arrangements with car companies. As stated in the report, at page 380 (R. 156), one shipper testified that he paid \$45 and \$50 per month per car for cars leased by him and that the profits derived therefrom were approximately \$32.50 per car per month on about 200 cars, or approximately \$78,000 per year. It seems that that shipper paid the rental and other expenses in connection with the cars leased by him from the car line, and received mileage allowances, either directly from the carriers or through the car line, which completely covered his expenses incident to the lease of the cars and left a large excess or profit, with the result that he obtained transportation at net rates lower than the published tariff rates to the extent of \$78,000 per

year.<sup>9</sup> Another shipper, who originally used assigned cars but upon learning that others were making money by the use of private cars, entered into a contract under which he paid nothing to the lessor, but received mileage earnings above a specified amount which averaged about \$18.75 per car per month in 1931, and \$21.27 per car per month in 1932 on 150 cars. (201 I. C. C., 380; R. 156.) Thus in 1932 that shipper's profit, gained through the aid of the private car line, amounted to \$3,190.50 per month or \$38,286 for the year. Any other shipper, which obtained his cars from the carrier would pay the published tariff rate without diminution. Other shippers, obtaining cars from the same or other car lines, might not be so fortunate in obtaining such favorable terms.

After further reviewing the evidence, the Commission made the following general finding:

"The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies [lessors] under the contracts and

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<sup>9</sup> Under circumstances somewhat similar to these, at least one private car line has been indicted under the Elkins Act for granting rebates. This indictment is referred to in the opinion of the Circuit Court of Appeals, which mentions the brief of the district attorney on a demurrer to the indictment. No opinion was rendered by the court in that case for the reason, which does not appear in this record, that the demurrer was withdrawn, a plea of *nolo contendere* entered, and a fine imposed, no appeal being taken.

remit the remainders to the shippers. The contract price is usually fixed sufficiently low so that the mileage earnings will exceed the cost to shippers. It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be, but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, *if only sufficient cars to take care of assured needs are leased*, profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment." (201 I. C. C., 381; R. 157, emphasis supplied.)

In the case at bar the shipper leased only 50 cars. The car company, however, agreed to supply as many additional cars over 50 as the shipper might need. In these circumstances, and in the absence of evidence on the subject, it seems a fair assumption that the number leased was sufficient to take care of the shipper's assured needs only, and that if its experience had not shown that it could keep 50 cars moving and thereby earn mileage it would not have agreed to lease that many.

"It cannot be denied," the Commission stated, "that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of

equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated." (*Ibid.*, 381; R. 158.)

Among the formal findings made by the Commission were several bearing upon these leasing arrangements, as follows:

"We find \* \* \* that the payment in whole or in part to shippers \* \* \* of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates \* \* \* .

We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper-lessee which results in the payment by such shipper of charges less than the published tariff rate." (*Ibid.*, 382-383; R. 160-161.)

In the body of the report, at pages 371-372 (R. 138-139), under the heading "Tank Cars", the Commission said that the record "is not comprehensive enough to warrant a conclusion as to whether abuses, such as we have discussed in con-

nection with private refrigerator cars, attend the use of private tank cars." "That such abuses, however, did exist," the Commission stated, "is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice." And although the proceeding related primarily to refrigerator cars and the findings were so restricted, the Commission affirmatively stated, page 382 (R. 159), that "*the general principles enunciated apply equally to all other types of private cars.*" [Italics ours.]

In the same proceeding the Commission considered and approved a tariff rule proposed by the carriers to the effect that the carriers would not furnish to shippers for loading on their lines any cars of private-car lines, including those of railroad control, unless such private car lines certified under oath to the carriers "that no gift, gratuity, or part of the earnings from mileage payments, or otherwise, will be paid directly or indirectly to shippers, their agents or employees." (201 I. C. C., 325, 374, 382; R. 53, 143-144, 159-160.)

In its report the Commission cited and reviewed the well-reasoned decisions in *Spencer Kellogg & Sons, Inc. v. United States*, 20 F. 2d 349 (2nd C. C. A.), certiorari denied 275 U. S. 566, and *Interstate Commerce Commission v. Reichmann*, 145 F. 235 (D. C., N. D., Ill.). In both of those cases a

third party (a party other than the railroad, but who nevertheless was closely associated with the transportation transaction) made a payment to the shipper of part of the money which it had received from the railroad, with the result that the shipper's transportation rate was reduced below the published tariff rate, and in both cases it was held that such payments were violative of the Elkins Act, which, in broad terms, forbids "any person" to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or other discrimination whereby the property is transported at a less rate than that named in the published and filed tariffs.

The Commission's report shows that numerous shippers throughout the country own private cars; also that there are numerous private-car companies, such as petitioner herein, which own various types of cars and lease or rent them to shippers, and that competition between them is keen. Shippers who own their own cars can receive no greater compensation for their use by the railroads than the published mileage allowances, which are, as nearly as may be, commensurate with the average cost of ownership. On the other hand, shippers who own no cars may earn unlimited profits, if they are permitted, without restraint, to make whatever terms they see fit with keenly competitive private car lines for the rental of cars. The present case shows that the shipper here involved was able to obtain mileage credits of approximately \$18,000 over the car rental in the short space of a few

months. This indicates the liberality of the terms of its contract with the car company. Another contract may provide for less liberal terms. There results such inequality as was condemned by this Court in *United States v. Union Stock Yard*, 226 U. S. 286, 308-309, where the Court found to be violative of the Elkins Act a contract under which the Stock Yard agreed to pay a packing company a bonus of \$50,000, and in which the Court said:

“ \* \* \* Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates—and we must consider the case in that light—and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms \* \* \*.”

The Commission's holding that a shipper who has no capital investment in cars, but leases or otherwise obtains cars through a car line, under terms which enable him to earn a profit, thereby obtains transportation at less than the tariff rate in violation of the statute, is supported by the decision of this Court in the *Union Stock Yard Case*, *supra*, and also by numerous other decisions in this Court, including *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155; *Davis v. Cornwell*, 264 U. S. 560; *L. & N. R. Co. v. Mottley*, 219 U. S. 467; *Chi., Ind. & L. Ry. Co. v. United States*, 219 U. S. 486, 496; *New Haven R. R. v. I. C. C.*, 200 U. S. 361, 391; *Houston & Texas Ry. v. United States*, 234 U. S. 342, 356; *Armour Packing Co. v. U. S.*, 209 U. S. 115.

In view of the history of the private car problem in the United States, as reflected in the reports of the Commission *In the Matter of Private Cars*, *supra*, and *Use of Privately Owned Refrigerator cars*, *supra*, of the Commission's endeavors to abate the abuses which have arisen in connection with use and leasing of private cars, and of the important purpose of the Commission's condemnation of leases between private car companies and shippers under terms so favorable that such shippers can and do obtain large profits and to that extent reduce their aggregate freight bill, the holding of the Circuit Court of Appeals that such leasing arrangements are not violative of the statute and in effect should be permitted to continue, seems both too narrow and unsound.

# MICRO CARD

TRADE

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1173



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It is true that in its report *In the Matter of Private Cars, supra*, in which it fixed 1 cent per car per mile as a reasonable allowance for the use of private tank cars, the Commission found that the allowance to be paid under all the circumstances and conditions shown should be considered on the average, because "there cannot be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately owned cars." (50 I. C. C., 683.) It is probably also true that some owners, handling their cars more efficiently than others, could make a profit at the uniform published mileage allowance. Perhaps absolute uniformity could never be attained. Examination of that report as a whole shows that the mileage fixed was based largely on evidence showing the costs of car ownership. If the El Dorado Company were the owner, instead of the lessee, of the cars in question, it would be entitled to the present published allowance of  $1\frac{1}{2}$  cents per mile, provided its own reporting marks were placed upon the cars, and if it were able under those circumstances to make a profit, it would not violate the law. But it seems obvious that its costs would be different if it owned its cars instead of leasing them, because if it depended only upon cars of its own ownership it would have to own as many as

the ordinary needs of its business require and, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership including maintenance, taxes, depreciation, interest on investment, and the loss of mileage whenever any of the cars stood idle.

But, in its later report in *Use of Privately Owned Refrigerator Cars*, in which the question of leases on favorable terms was particularly in issue, the Commission found that a shipper who has no investment in cars may not lawfully make a profit through leasing arrangements. There is no inconsistency between the two reports. The court below seemed to give full consideration to the earlier report and overlook the salutary principle established in the second report. Both reports show that private car lines are owners of large numbers of cars and that the competition between them is keen. It seems indisputable that they are in a position to grant rebates, as clearly shown by the *Reichmann Case*, and by the circumstances in the present case, if, by private negotiations with shippers, they may lawfully make whatever terms they see fit. For example, here the rental for permanent cars was \$27.50. Suppose instead it had been \$7.50. As long as the parties are under no restraint, there can be no uniformity. Under the principle enunciated by the Commission there is uniformity, and at the published tariff rate, among this class of shippers who are not car owners. The principle enun-

ciated by the Commission is that they may be reimbursed in the form of mileage allowances up to the full extent of their expenses in connection with the cars, so that they will pay no more or less than the published tariff rate.

The Circuit Court of Appeals gave no consideration whatsoever to the question of the reasonableness of the rental fixed in the agreement between the car corporation and the shipper. Nor was there evidence to show what facts and circumstances were taken into consideration by the parties in agreeing upon that rental. Under the agreement, the shipper was to pay that rental and he was to be paid all mileage allowed by the railroads.

Possibly, therefore, the latter consideration influenced the rental; and it is worthy of note in this connection that the  $11\frac{1}{2}$ -cent mileage was paid on the going loaded movement and also on the return empty movement. If it be assumed that the mileage from Berkeley to a particular eastern destination is 2,500 miles,<sup>10</sup> the total loaded and empty mileage would be 5,000 miles, which at  $11\frac{1}{2}$  cents per mile would amount to \$75. Thus, but one transcontinental trip of one car during the course of a month would earn mileage \$47.50 in excess of the rental of \$27.50 per car per month for the permanent cars and more than double the rental.

<sup>10</sup> The distance from Berkeley to Cincinnati, Ohio, via the Southern Pacific, Ogden, Union Pacific, Omaha, Chicago and North Western, Chicago, and Pennsylvania, is approximately 2,552 miles.

for the additional cars at the rate of \$30 per car per month for the time the car was in the service of the shipper.

The Circuit Court of Appeals stated that the terms of the lease required the shipper "to take the cars into its possession." The record shows that at the time the lease in question was entered into the 50 permanent cars were already in possession of the shipper under the terms of the immediately prior lease; and the testimony of the assistant comptroller of the car company, quoted above, indicates that some such leasing arrangement between the car company and this shipper had been in existence over a long period of years. Yet the record affords no light upon those prior transactions. Did the shipper year after year without fail earn large profits from its arrangements with the car company? Nor was there any evidence to explain how it happened that 50 cars were agreed upon as the number of permanent cars. The agreement plainly provides that the car company will furnish *all* the cars the shipper needed, and the shipper agreed not to obtain cars from any other source. But as shown, the shipper bound himself to pay rental only upon a certain number agreed upon by it and the car company. They were in a position to agree upon any number as the permanent cars. In the absence of evidence upon the subject perhaps it can be assumed that the shipper knew from its experience over a long period of years that it could keep that number.

moving—that that number represented its *assured needs*. The shipper of course could not know definitely in advance that in all events and without fail for any reason whatsoever, even a *vis major*, it could keep these cars moving and therefore earn mileage. Yet the regular course of business over a long period of years in the past might have indicated with reasonable certainty that it could.

*The record does not establish definitely that the shipper would be held liable for rental throughout the full three-year period.* In assuming that it would be, the court below said:

“Also before it can be determined whether the three-year lease will create a cost less than the mileage earned by the leased cars, it must be considered whether the plant will remain in operation. The monthly rentals go on though a fire or earthquake or a strike makes it impossible to manufacture the oil for shipment in the cars. The supply of copra from the Philippines may cease or become so costly that it does not pay to operate. Tariffs on copra may stop profitable manufacture. \* \* \*.”

But apparently the court failed to take into consideration the provisions of the seventh article of the agreement, which provides:

“It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the second party shall make default in the payment

of the rental or service charges for said cars at the time when the same becomes due and payable, and such default shall continue for five (5) days, or shall make default in the performance of any of the other agreements herein contained to be by it performed, and such default, other than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the first party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the second party and furnish the same or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the second party agrees to satisfy and pay any and all such deficiency promptly upon demand from time to time." (R. 26-27.)

If any of the calamities mentioned by the court should happen, or if for any other reason the plant should close down, the shipper could default in the payment of the rental of the cars. Then the car company would have two elections: first, it could terminate the agreement, second, it could take the cars and rent them to others and the shipper would be liable only for a deficiency in the earnings.

There might be no deficiency. There was no evidence as to what had been the practice of the car company in such instances and no evidence as to what its policy would be in the event this shipper defaulted because things occurred to cause its plant to shut down.

The Circuit Court of Appeals found the oil to be "both inflammable and explosive." There is no such evidence. The Commission's regulations governing the transportation of explosives and other dangerous articles do not list this article either as explosive or inflammable and do not require any particular precautions in its transportation.<sup>11</sup>

The Circuit Court of Appeals assumed that "Since the El Dorado Company has possession of the cars, it must provide trackage facilities for their storage and switching." There is no evidence upon this subject and nothing to show whether the shipper would have been put to greater expense for plant trackage facilities than it would if it had obtained its cars from the railroads. Shippers using private sidetracks or intraplant tracks in preference to the carrier's public team tracks usually are required to pay for them. Cf. *Practices of Carriers Affecting Operating Revenues or Expenses, Terminal Services*, 209 I. C. C. 11, 21;

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<sup>11</sup> Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight and Express and in Baggage Service, revised, effective October 1, 1930.

*General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237.

The Circuit Court of Appeals stated in its opinion that the Commission, since its decision *In the Matter of Private Cars, supra*, "has raised the tariff rate on tank cars to 1½ cents per car mile traveled." The Court cited *Paragon Refining Co. v. A. & S. R. R. Co.*, 118 I. C. C. 166 (1926), but that case does not support the court's statement. It was a case presented on the Commission's shortened procedure, wherein, with the consent of the parties, the facts were shown by affidavits, and formal hearing waived. The case related to the movement of petroleum in tank cars from Louisiana to Toledo, Ohio, passing en route over the line of the Alton & Southern, a switching carrier within the St. Louis district. For the use of the private tank cars in which the shipments were transported, the line haul carriers paid an allowance to the shipper of 1 cent per mile. The Alton & Southern refused to pay any allowance, apparently on the ground its switching charge was low. The Commission found that nevertheless it should pay the mileage and it awarded reparation at 1 cent a mile, which was the allowance generally in effect at the time the shipments moved, and required it to pay 1½ cents in the future, the generally applicable allowance having been increased in the meantime. The question was not what the mileage should be, but rather whether the switching carrier should pay any mile-

age. It cannot be said accurately that by that report the Commission raised the mileage to 11½ cents per mile—it had previously been increased to that basis by the voluntary action of the carriers themselves. The Commission has made no investigation as to the reasonableness of this increased allowance in its general application throughout the country.

The entire discussion of the Circuit Court of Appeals in support of its holding that "The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company" overlooks the fact that the very mileage rates referred to are not, by the terms of the mileage tariffs themselves, payable to the El Dorado Company. As previously shown herein, the published tariff provision by its terms precluded the payment of the mileage allowances to that company upon the cars in question. Nor would the Elkins Act or any provision of the Interstate Commerce Act *require* the mileage to be paid to the car company if it did not supply the cars to the carriers. Such allowance provisions are obviously to be interpreted and applied in the light of the facts, and though published they may nevertheless be *rebates*, if not within the meaning of the Elkins Act, then within the meaning of sections 2 and 6 (7) of the Interstate Commerce Act. In *Warehouse Co. v. United States*, 283 U. S. 501, the allowance paid by the Pennsylvania to its contract warehouse com-

pany was published in the carrier's tariffs on file with the Commission, but, upon a finding by the Commission that the warehouse actually performed no service for which it was entitled to an allowance, this Court pronounced the payments to be rebates in violation of section 2 (page 511).

In *U. S. v. American Tin Plate Co.*, 301 U. S. 402, the allowances were published yet they were found to be unlawful refunds or rebates in violation of section 6 (7) and sections 2 and 3 (1).

Such cases illustrate the necessity for Commission action in allowance cases like the present one. For published tariff provisions, even if binding in cases brought in the first instance in the courts, are not binding upon the Commission, which is authorized to look through the form to the substance of a transaction and pronounce it to be what it really is. As said in *I. C. C. v. B. & O. R. R.*, 225 U. S. 326, 345, "Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the form to what caused them and what they are intended to cause, and do cause." In *Warehouse Co. v. United States*, *supra*, at page 511, the Court said:

"Where a forbidden discrimination is made, the mere fact that it has long been continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." Cf. *U. S. v. American Tin Plate Co.*, 301 U. S. 402, 406, 407.

In the report of the Commission, Division 2, in *Refrigerator Car Mileage Allowances*, 232 I. C. C. 276, decided April 27, 1939, it was held that the Interstate Commerce Act does not require the filing or publication of allowances or other compensation paid by carriers subject to the Act to private car companies which are not shipper owned or controlled. The report recognized the full authority of the Commission under section 15 (13) of the Act over allowances to shippers, and pointed out that such allowances affect directly the freight rates paid by shippers, citing *Ellis v. Int. Com. Comm.*, 237 U. S. 434, and must be filed under section 6. The question determined was the authority of the Commission over payments by railroads to private car companies that are not shippers and not shipper owned or controlled, like the car company here before the Court. The Commission said that "a review of the various provisions of the law which we administer leads us to the conclusion that the Commission is without authority to pass upon or to fix the compensation paid by railroads to private car companies for the use of the equipment furnished directly by them to the railroads." It held:

\* \* \* \* Section 6 of the act requires that 'every common carrier subject to the provisions of this' part shall file with the Commission \* \* \* schedules showing all the rates, fares, and charges for transportation between the different points \* \* \* As neither the private car com-

pany is subject to provisions of the act, nor does the compensation paid to such company for the use of its cars cover transportation in any form, it is evident that the statement of such compensation is not required by section 6 to be filed with us. The tariff schedules concerned should, therefore, be promptly amended by striking therefrom all items covering the payment of compensation to private car companies, not shipper owned or controlled, for the use of equipment furnished by them to respondents."

If the Commission is without jurisdiction in such circumstances and such tariff schedules are not required by the Act to be filed with the Commission, it would seem to follow that deviation therefrom could not be a violation of the Elkins Act in instances where such a private car company furnishes cars to the carrier. But whether the amount of the compensation to be paid under such circumstances is published in the tariffs or not, if the car company pays a portion of the compensation to a shipper, as in the *Reichmann* case, it violates the Elkins Act, since it thereby grants a rebate whereby the shipper obtains transportation at less than the published rate.

The Circuit Court of Appeals stressed the fact that the Elkins Act makes it a criminal offense to grant or accept rebates and provides for heavy fines and also imprisonment for violation of its provisions; and the opinion seems tacitly to expect

evidence in the record of this civil case that would prove guilt beyond a reasonable doubt, as in a criminal case. The court apparently failed to note that sections 2 and 3 of the Elkins Act provide for civil remedies in addition to the criminal procedure of section 1 and that the purpose of the Act as a whole was to aid in the enforcement of the remedial provisions of the Interstate Commerce Act. Cf. *United States v. Union Stockyard*, 226 U. S. 286, 306, 309.

The holding of the Circuit Court of Appeals, repeated several times in its opinion, that Congress by the enactment in 1906 of section 15 (13), Interstate Commerce Act, "provided for the right of owners shipping goods in interstate commerce to supply their carriers with the facilities necessary to the transportation of their products" is inaccurate and unsound. It was held by this Court in *A. T. & S. F. Ry. Co. v. United States*, 232 U. S. 199, 214-215, that:

"Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. \* \* \*"

As shown above, page 19, it is the duty of carriers to furnish transportation upon reasonable request, and transportation, within the meaning of the Interstate Commerce Act, includes cars. In

*Use of Privately Owned Refrigerator Cars, supra*,  
(201 I. C. C., page 373) the Commission said:

"It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. \* \* \*

A private-car owner, whether he be a shipper or not, has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without its consent. If the carriers have suitable cars and will furnish them on demand, they may refuse to transport shipments in private cars. They are privileged to do so at any time they have, or will secure and furnish, suitable equipment to carry the commodities they hold themselves out to transport. \* \* \*"

In view of these authorities and upon reason, a shipper has no right to furnish any part of the transportation service which the carrier is under duty to perform. The only right given the shipper by section 15 (13) is to a reasonable allowance if, with the carrier's consent, he performs a part of the transportation service. Cf. *I. C. C. v. Waste*

*Merchants Assn.*, 260 U. S. 32; *Waste Merchants Assn. v. Director General*, 57 I. C. C. 686.

It is true that, as pointed out in the Commission's report in *Use of Privately Owned Refrigerator Cars*, *supra*, the carriers undertake generally to furnish refrigerator cars, so that shippers desiring cars of that type have the alternative of either obtaining them directly from the carriers or arranging for their supply by a private car line, whereas, in the present case, involving a special type of tank car, the shipper could not rely upon the carriers for a dependable supply and was therefore under the necessity of either purchasing such cars for its use or otherwise obtaining them as by lease or rental from a car company. Yet this difference in circumstances does not affect the principle upon which the Commission's holding in the refrigerator car case rests. The fact that the shippers could get refrigerator cars from the carriers and instead chose in some instances to obtain them by lease under favorable terms from private-car concerns does not lessen the force of the fact that the terms were so favorable that the shippers were virtually certain of getting a profit and thereby reducing their aggregate freight bill by the amount of the profit, and obtaining transportation at that much less than the published tariff rates. That this is so is affirmed by the Commission's statement previously referred to that the general principles

enunciated in the refrigerator car case "apply equally to all other types of private cars."

Aside from the question whether shippers have the choice of obtaining cars from the carrier or from a private car line, the ultimate principle enunciated by the Commission's report, which we submit is sound, is that they may not lawfully make leasing arrangements with car lines, so favorable in their terms that they can and do obtain transportation at less than the published tariff rates. Here it is the contention of the shipper that it is entitled to the full mileage allowances, irrespective of whether those allowances exceed its costs for the cars or not. The shipper made no effort to prove what its actual costs were. So far as the record shows or intimates, it had no costs other than the car rental. If it is sound, as a matter of law, that a shipper is not entitled to receive mileage allowances, in the case of leases, either directly from the railroad or indirectly through the car company, in excess of his rental and other expenses in connection with the cars, then the suit of this shipper must fail because it claims the entire mileage allowances without any proof as to what its actual costs were.

#### CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, upon the merits if this Court determines that the District Court had jurisdiction, or, if it determines

that the District Court was without jurisdiction, with directions to remand the case to the District Court for dismissal of the complaint on that ground.

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 ✓ *Interstate Commerce Commission.*

DANIEL W. KNOWLTON,  
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*Of Counsel.*

#### STATEMENT OF THE SOLICITOR GENERAL

The Solicitor General authorizes the submission of the foregoing brief, prepared by the Interstate Commerce Commission, as its presentation of its views upon the questions involved.

ROBERT H. JACKSON,  
*Solicitor General.*

NOVEMBER 1939.





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In the Supreme Court

FORE CROPLEY  
CLERK

OF THE

United States

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION  
(a corporation),

*Petitioner,*

vs.

EL DORADO TERMINAL COMPANY  
(a corporation),

*Respondent.*

**RESPONDENT'S PETITION FOR A REHEARING.**

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*Respondent.*

## RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondent El Dorado Terminal Company, respectfully petitions for a rehearing of this cause upon the ground that the Court in its opinion not only failed to determine the issues presented in the record, but on remanding the case stayed the action of the Dis-

strict Court pending determination by the Interstate Commerce Commission of questions that were not involved in the present action, and the final decision of which by the Commission could not properly affect the ultimate decision of the case.

As stated in the Court's opinion, respondent brought this action in assumpsit to recover a sum alleged to be due it from the car corporation under the terms of a car leasing agreement. In its answer the car corporation admitted the execution and validity of the agreement, also the amount due thereunder to respondent, but pleaded that the payment of the said sum was prohibited by the provisions of the Elkins Act, and that such payment would subject the car corporation to prosecution for a violation of the provisions of said Act. The Circuit Court of Appeals held that the burden of proving this defense rested upon the car corporation, and that it had failed to make such proof. The Circuit Court of Appeals also held that the sums paid by the carriers to the car corporation as mileage allowances for the furnishing of the tank cars by respondent as the lessee thereof were those which were provided to be so paid in the rules constituting a part of the filed and published tariffs of the railroad carriers; that such payments by the carriers were contemplated by the Act and the published tariffs, and there was no inhibition or legal reason preventing the car corporation from paying over to respondent the moneys so collected, in accordance with the agreement under which respondent leased the said tank cars.

In its opinion this Court does not question the correctness of the decision of the Circuit Court of Appeals on either of these points. Responsive to the contention of the Interstate Commerce Commission as amicus curiae, this Court also holds that the lower courts had jurisdiction of the subject matter and of the parties. However, the cause was remanded "to be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it". The decision of this Court upholds the jurisdiction of the District Court and of necessity that of the Circuit Court of Appeals. It does not reverse the decision of the Circuit Court of Appeals that the evidence does not support the defense of the car corporation that payment of the car mileage received by that corporation in accordance with the car lease agreement was prohibited by the provisions of the Elkins Act. There was no question before the Court as to the validity of the railroad tariffs or the portions thereof providing for payment of mileage allowances. Nevertheless this question was treated as all important by this Court, to the exclusion of the question that was actually presented. Not only has the Court failed to decide the issues before it, but it has tied the hands of the District Court pending determination by the Interstate Commerce Commission of a new proceeding to be hereafter instituted. This is contrary to the rule announced in the case of *Helis v. Ward*, decided by this Court on December 18, 1939 that "It is well settled that this Court confines itself to the ground upon which the writ was asked or

granted, the review here being no broader than that sought by the petitioner."

The administrative proceeding, which this Court has in mind, is a proceeding before the Interstate Commerce Commission by respondent as the lessee-shipper to secure an allowance for furnishing the tank cars and a provision in the published rules or tariffs covering the payment of such allowance. We believe that in so holding the Court has proceeded on the erroneous understanding that the tariffs in effect during the period covered by this action did not, as contemplated by section 15 (13) of the Interstate Commerce Act, provide for the payment to a shipper of allowances for the furnishing of the tank cars. The record discloses (R. 192-201) that the rules provided for the payment of a definite mileage allowance "to the car owner or to the party who has acquired the car or cars". In April, 1935 this rule was changed to exclude a lessee of tank cars from the class of those entitled to receive the mileage allowance. But that change *was not applicable* to the period for which the mileage allowances sued for in this action either accrued or were paid by the carriers. It is obvious that respondent as the lessee of the tank cars was a party who "acquired the cars" within the language of the rules, and this Court concurs in the decision of the Circuit Court of Appeals that respondent furnished the tank cars although for the convenience of all parties the owners' marks remained on the cars and the car corporation in its lease agreed to collect the mileage as the agent of the lessee.

In its opinion this Court concedes that the leasing of cars to shippers for use in transportation of their commodities over railway lines is not only of long duration but well understood and entirely lawful; also that the Interstate Commerce Commission has ~~so~~ held even to the point of sanctioning the payment by lessor as owner to the lessee as car shipper of a part of the mileage earned by the cars. (*In the Matter of Private Cars*, 50 I. C. C. 652, 680.) That order was issued in 1918 and has never been set aside or even challenged. The present allowance of  $11\frac{1}{2}\text{¢}$  per mile became effective by tariff rules filed and published in 1926 and the Interstate Commerce Commission has acquiesced therein ever since. Under the Act the carriers were authorized to make allowances that were "just and reasonable" for the furnishing of tank cars or other facilities and the Commission was charged with the duty of suspending or correcting any such allowances either on complaint or on its own initiative. The acquiescence over a period of more than thirteen years in the mileage allowances stated in said published rules constitutes an approval by the Commission of the practice of shippers furnishing cars leased by them and of the payment by the carriers of the fixed mileage allowance as provided in said rules. Therefore the only point that is not settled by the action of the Commission is the compensation to be paid by a car lessee to a car owner for the use of the tank cars. The Court's conclusion that this presents a question calling for the exercise of the administrative authority of the Interstate Commerce Commission overlooks the fact that the Com-

mission is only authorized under the Act to determine the amount to be paid by the carriers for the furnishing of the cars and to limit such payment to what is just and reasonable for that service. The rental paid by the car lessee to the car owner for the use of the cars has no necessary relation to what may be reasonably paid by the carrier to the shipper for the use of the cars. The car rental in a particular case may be more or less than the value of the service to the carrier. The question which the Commission is authorized under the Act to determine is what does the service save to the carrier and what is a reasonable compensation therefor—not what does it cost the shipper.

The only contention that is urged either by the car corporation or the Commission is that the rental paid by the respondent for the use of the tank cars under the terms of its lease is less than the mileage paid by the carriers for the furnishing of the cars and therefore might result in a profit to the shipper on its car lease. This is a question of business economics between the car owner and the oil works, neither of which is a carrier. No showing was made nor is it claimed that any other shipper is concerned with or affected by the car rental paid by respondent to the car corporation.

If the reasonableness of the mileage allowances or the propriety of their payment either to car owners or shippers were in question there might be a case for the administrative authority of the Commission, but as before stated, those matters were definitely

settled by the Commission *In the Matter of Private Cars* (50 I. C. C. 652), after an exhaustive investigation. The conclusions there reached were not reversed or affected as to tank cars by the action of the Commission in the proceeding entitled *In Re Privately Owned Refrigerator Cars*, and the Commission expressly so stated. Under the terms of the car lease agreement (R. 20 et seq.) respondent as the lessee undertook to pay a monthly rental per car, regardless of whether the cars stood idle or were used in transportation. The Court does not hold, nor is it contended by the car corporation or the Interstate Commerce Commission, that the car lease agreement was in any respect illegal. The only claim is that the car rental so paid by respondent for the use of the cars is less than the cars will earn when used for transportation purposes according to the rules covering mileage allowances. This Court has held in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, that the control of the Commission over the use of privately owned facilities must be exercised through its control of the carriers, and that it has no jurisdiction over the dealings between a car owning company and the lessee of the cars even though the lessee is a shipper. The Commission itself has recognized this limitation upon its authority in the matter entitled, "Investigation and Suspension Docket No. 4572, decided April 27, 1939". In effect, therefore, the decision of this Court remands the case to the District Court with directions to suspend action thereon until the Interstate Commerce Commission

shall reach a determination in some proceeding, that has not been instituted, challenging in whole or in part the propriety of practices and tariffs that the Commission has knowingly acquiesced in for a period of more than thirteen years. Moreover this proceeding which the District Court is directed to wait upon, would involve the amount of the car rentals to be paid by a lessee shipper to a car owner for the use of tank cars. The Commission has no administrative authority or other jurisdiction or control over this question. This is a wholly different question from that before the Court in the cited case of *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247.

Until the existing tariffs and mileage allowances have been held not "just and reasonable", they are binding upon carriers and shippers alike, and may not be departed from without violation of the provisions of Section 1 (2) of the Elkins Act. If, therefore the Commission should in such proceeding as is suggested in the opinion of this Court, modify or restrict the mileage payments to be made by carriers to lessee-shippers such order could only be effective as to the future. The Commission could not invalidate the lease agreement between the car corporation and respondent, or change the fact that by the terms of that agreement the car corporation was appointed respondent's agent to collect the mileage allowances. The car lease agreement by its terms lapsed as of December 31, 1936, so that it would be unaffected by any future tariffs or rules of the carriers. Whatever, if anything the Com-

mission may do or say as to future mileage allowances for the furnishing of tank cars cannot destroy the fact that under the preexisting rules, which have been sanctioned by acquiescence on the part of the Commission for at least thirteen years, the carriers have paid to the car corporation, as the registered owner of the tank cars in question and agent of the supplier under its contract, the mileage allowances provided to be paid. In so doing they have discharged their obligations under the rules. The utmost that could be asked of the Interstate Commerce Commission in the suggested proceeding is that after investigation it should order the revision and republication of rules by the carriers for a uniform mileage allowance to be paid to lesseeshippers for the use of cars leased by them from car owners. This could not affect the contract sued upon in this case, and the question which is before this Court would still confront the District Court as to whether the car corporation, having received as respondent's agent the mileage allowances from the carriers, should retain them, without any right or title thereto, or pay them over to respondent as provided in the car lease agreement. The suggested proceeding before the Interstate Commerce Commission would have proven futile, and the District Court would have received no guidance from this Court as to how to proceed in the determination of the question involved.

We respectfully submit that the case merits further consideration on the part of this Court, and that the decision of the Circuit Court of Appeals should be af-

firmed, leaving the Interstate Commerce Commission free to take such steps as it might thereafter conclude to be necessary or proper with respect to existing tariffs.

Dated, San Francisco, California,  
January 22, 1940.

Respectfully,

W. F. WILLIAMSON,

W. R. WALLACE, JR.,

RICHARD P. NORTON,

WILLIAMSON & WALLACE,

*Attorneys for Respondent  
and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondent and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,  
January 22, 1940.

W. F. WILLIAMSON,

*Of Counsel for Respondent  
and Petitioner.*





# SUPREME COURT OF THE UNITED STATES.

No. 129.—OCTOBER TERM, 1939.

General American Tank Car Corpora- tion, Petitioner, vs. El Dorado Terminal Company.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
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[January 2, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This was an action in assumpsit brought by the respondent to recover a sum alleged to be due it by the petitioner under the terms of a car leasing agreement. The answer admitted the execution of the agreement but pleaded that payment of the sum demanded would amount to the making of a rebate, contrary to the provisions of the Elkins Act.<sup>1</sup> The District Court rendered judgment for the petitioner which the Circuit Court of Appeals reversed, holding

<sup>1</sup> Act of February 19, 1903, c. 708, Sec. 1, 32 Stat. 847, as amended.

"(3). *Receiving rebates; additional penalty and recovery thereof.*—Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be." U. S. C., Tit. 49, § 41(3).

2 *General American Tank Car Corp. vs. El Dorado Term. Co.*

the respondent entitled to the full amount claimed.<sup>2</sup> We granted certiorari on account of the importance of the question involved and of the allegation that the judgment was not in accord with prior decisions of this court.

The petitioner is a corporation, unaffiliated with any railroad, which owns and leases tank cars to railroads and to shippers for use in transportation in interstate commerce. The respondent is a wholly owned subsidiary of El Dorado Oil Works, a manufacturer of coconut oil operating a plant at Berkeley, California, and brought the action as assignee of the latter's rights under the lease.

September 28, 1933, the petitioner and the Oil Works entered into an agreement whereby the former leased to the latter fifty tank cars designated in the contract as "permanent cars", at a rental of \$27.50 per car per month. The petitioner agreed to supply the Oil Works with such additional cars as it might need for the shipment of its products, on a rental basis of \$30.00 per car per month, these to be ordered from time to time as needed and returned when no longer required.

The contract provided that the petitioner would collect, and credit to the rental account of the Oil Works each month, all mileage earned by the cars while in the Oil Works' service, "according to and subject to all rules of the tariffs of the railroads." The petitioner was to pay the cost of repairs and maintenance but the Oil Works was to be responsible for damage or destruction of the cars while on privately owned tracks.

The leased cars were used by the Oil Works for shipment of its products. Such use was important to the Oil Works since the railroads serving its plant were not prepared to furnish shippers a full supply of the kind of cars needed for carrying the oils in question. The railroad tariffs, though stating rates on the Oil Works' products when shipped in tank cars, disclaimed any obligation to furnish cars of the requisite type.

The carriers maintain tariffs applicable to the allowances to be made to car owners for the use of tank cars, which provide for payment of one and one-half cents per car mile loaded and empty. The tariffs also embody rules which, during part of the period in controversy, stated that mileage payments would be made only to the party whose reporting marks appeared upon the cars and during part of the period that "mileage for the use of cars of private own-

<sup>2</sup> 104 F. (2d) 903; 104 F. (2d) 916.

ership will be paid for loaded and empty movements only to the car owner—not to a lessee.” The rules precluded payment of the mileage allowance to the Oil Works under the circumstances of this case, since the lease stipulated that all the leased cars should bear the reporting marks of the petitioner.

The petitioner complied with the provisions of the agreement until July 2, 1934, when the Interstate Commerce Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, in which it considered the payment of mileage allowances to shippers either directly or through car owners, which payments exceeded the total of the agreed rental for the use of the cars and any additional actual expenses of the shipper in connection with the cars. In that case the Commission held that such payments operated to give the lessee transportation of his products at lower rates than those paid by other shippers who use cars furnished by the carriers and thus amounted to a rebate from the published transportation rates. The petitioner's practice had been to collect the mileage, deduct the rental due, and pay over the balance monthly. After the rendition of the Commission's decision the petitioner collected the mileage from the railroads, credited the Oil Works with the rental due, retained the balance, and refused to pay it over. The ground of its refusal was that to follow the former practice would render it a participant in illegal rebating.

It was disclosed at trial that throughout the period covered by the respondent's claim the mileage allowances had, in every month, exceeded the rentals, leaving a substantial balance which the respondent insisted should be paid to it. During the seven month period from November 1, 1934, to May 31, 1935, this balance amounted to \$17,614.13.

The District Court concluded that payment to the shipper of any excess of the mileage allowances over stipulated rents would constitute a rebate prohibited by the Elkins Act and, in that view, held that the respondent could not recover. The Circuit Court of Appeals permitted a recovery on the ground that Sec. 15(13)<sup>3</sup> of the Interstate Commerce Act authorized the payment of mileage allowances by railroads for the use of private cars furnished by shippers for the transportation of their own commodities; that the practice had been approved by the Commission, and maximum

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<sup>3</sup> U. S. C. Tit. 49, Sec. 15(13).

4 *General American Tank Car Corp. vs. El Dorado Term. Co.*

rates fixed by it; that the one and one-half cents per car mile allowance appeared in the carriers' published tariffs dealing with the subject and was, and would remain until action by the Commission, the legal rate payable for the use of such cars; that, while it is open to the Commission, to inquire, on its own motion or on complaint, as to any abuses in connection with such tariff mileage allowances, until the Commission does act, the carriers are justified in continuing to pay the scheduled rates; that the shipper in this case is the furnisher or supplier of privately owned cars to the carriers, and the lease agreement constitutes the petitioner a mere agent for the collection and payment of the mileage allowances to the shipper; and that, consequently, the payment, by the petitioner to the shipper, of any excess of the mileage earnings is not a rebate within the terms of the Elkins Act.

The petitioner insists that this conclusion is wrong and that of the District Court correct. The Interstate Commerce Commission, as a friend of the court, has filed a brief in which it contends, first, that the District Court was without jurisdiction to entertain the cause, as the question involved is one primarily for administrative action by the Commission and, secondly, that the payment of the excess credits by the petitioner would result in payment of a prohibited rebate to the shipper.

We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act.

Freight cars are facilities of transportation, as defined by the Act.<sup>4</sup> The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper,<sup>5</sup> and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Com-

<sup>4</sup> 49 U. S. C. § 1(3).

<sup>5</sup> 49 U. S. C. § 1(10) (11); *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121; *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120.

proper service used t and re its own be paid of the which o as the

sion.<sup>6</sup> If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence.

Cars thus leased and used by the carriers are to be distinguished from so-called private cars with which we are here concerned. Shippers, particularly those who require a specialized form of freight car for transportation of their products, may, and do, own cars adapted for the purpose. They may, and do, in lieu of owning such facilities, rent them from the owners. Car companies owning a large number of a special type of freight car, some affiliates or subsidiaries of railroads and others, like the petitioner, wholly independent and financed by private capital, have, for many years, been in the business of leasing cars to shippers. The practice has been well known and well understood. It is entirely lawful and the Commission has so held.<sup>7</sup> But the practice cannot modify the requirements of paragraph (13) of Sec. 15,<sup>8</sup> which governs the payment of allowances for private cars, and invests the Commission with authority to find and declare what allowances are reasonable. As the Circuit Court of Appeals has pointed out, different shippers may have differing costs in respect of privately owned cars furnished the carriers. Nevertheless, as the allowances to be made them by the carriers for the use of such cars must be subject of published schedules,<sup>9</sup> and must be just and reasonable,<sup>10</sup> the Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover costs and prescribe a uniform rate which will reflect such

*Ill. v. Interstate Commerce Commission*, 237 U. S. 434.

*In the Matter of Private Cars*, 50 I. C. C. 652.

*Allowance for service or facilities furnished by shipper.*—If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of instrumentality so furnished, and the same shall be enforced in like manner as orders above provided for under this section. 47 U. S. C. § 15(13).

U. S. C. § 6(1)(7)

U. S. C. § 15(13), *supra*, note 9.

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experience. It is inevitable that some shippers may be able to furnish facilities at less than the published allowance while others may find their costs in excess of it. This fact, however, does not militate against the fixing of a uniform rate applicable to shippers properly classified by the Commission.<sup>11</sup>

From what has been said it results that the shipper in this case was permitted by law to furnish freight cars for the transportation of its products and to be paid a reasonable allowance for performing this portion of the public service which the carrier was bound to render, and that the law requires that the amount and conditions of payment of such allowance shall be set forth in a published tariff. If this is not done, the shipper may complain to the Commission, to the end that a proper allowance be ascertained and made effective by a schedule duly published. In the present case this has not been done. Nor has the shipper ever applied to the Commission for its decision as to what was a proper allowance for the cars furnished by it.

As we have stated, the mileage tariffs published by the American Railway Association, which govern the instant case, require that private cars be marked with so-called reporting marks or initials together with a car number. These marks are for the purpose of keeping records of the car's movements and mileage. Appropriate marks to designate privately owned cars are assigned by the Railway Association to their owners. The rules appearing in the tariff during a portion of the period in question provided that the mileage for the use of cars of private ownership would be paid to the car owner or to the party who had acquired the car or cars as shown by the permanent reporting marks. The lease agreement provided that the cars should bear the reporting marks of the petitioner. Thus the carrier was bound by its rules to pay the allowance to the petitioner. During a portion of the term in controversy the rules provided that mileage could be paid only to the car owner, not to a lessee. Here again the rules precluded the payment of the allowance by the carrier to the shipper.

The Circuit Court of Appeals has held, and we think correctly, that the shipper—the Oil Works—furnished the cars to the carrier in the present instance. The petitioner did not. The shipper

<sup>11</sup> Compare *Interstate Commerce Commission v. Duffenbaugh*, 222 U. S. 42, 45.

is then entitled, under the plain terms of Sec. 15(13), to be paid the carrier a just and reasonable allowance for providing the facility. It seems clear that no rule or regulation of the carrier may provide for the payment of such allowance to any other person. And we think the consideration that, in this case, the petitioner acted merely as collecting agent for the shipper, does not take the case out of the Commission's jurisdiction. If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case.<sup>12</sup> The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission.<sup>13</sup>

As the tariffs now contain no provision for the payment of ear-leage allowances by the railroad to the shipper directly, and as, on the face of things as disclosed by this record, the shipper is apparently reaping a substantial profit from the use of the cars, a clear case is made for the exercise of the administrative judgment of the Commission. The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission and not for determination by a court.<sup>14</sup>

We have said that the Commission insists the District Court was without jurisdiction of the cause. With this we do not agree. The action was an ordinary one in assumpsit on a written contract. The court had jurisdiction of the subject matter and of the parties. It appeared here, as it did in *Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247, that the question of the reasonableness and

Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323.

*Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290, 291.

*Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304.

8. *General American Tank Car Corp. vs. El Dorado Term. Co.*

legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission. The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders.

When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal Co. v. Penna. R. R. Co.*, *supra*, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.<sup>15</sup>

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

*So ordered.*

A true copy.

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*Clerk, Supreme Court, U. S.*

<sup>15</sup> Compare *Morristown Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304, 314, where no rights could be saved by retaining the cause; and *St. Louis & N. Ry. v. Brownsville Dist.*, 304 U. S. 295, 301, where the District Court was asked to make an order which the Commission alone had authority to make.



# MICRO CARD

# 22

TRADE

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# 39



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